89-1035

Docket No.

IN THE

Supreme Court of the United States

October Term, 1989

CSX TRANSPORTATION, INC.,

Petitioner,

v.

WILLIAM L. CALDWELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

William T. Prince
Edward L. Oast
Samuel J. Webster
WILLIAMS, WORRELL, KELLY,
GREER & FRANK, P.C.
600 Crestar Bank Building
Five Main Plaza East
Post Office Box 3416
Norfolk, Virginia 23514-3416
(804) 624-2600

Counsel for Petitioner

103 pp

QUESTION PRESENTED

Whether a state statute that permits application of the doctrine of forum non conveniens when the more convenient forum is located within the state, but absolutely prohibits application of the doctrine when the more convenient forum is located outside the state, violates either the Due Process or Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

UNITED STATES CONSTITUTION

STATUTES

MISCELLANEOUS AUTHORITIES

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SEABOARD SYSTEM RAILROAD, INC.,

Petitioner,

v.

WILLIAM L. CALDWELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner, Seaboard System Railroad, Inc.,[1/] respectfully prays that a writ of certiorari be issued to review and reverse the opinion and judgment of the Supreme Court of Virginia.

OPINIONS BELOW

The opinion of the Virginia Supreme Court, Caldwell v. Seaboard System

---

1/ Pursuant to Rule 28.1, petitioner's corporate affiliates are listed in the Appendix at 66A.

Railroad, Inc., (App. 22A-53A), is reported at 238 Va. 148, 380 S.E.2d 910 (1989). The trial court's order overruling Petitioner's Objection to Venue and Motion to Dismiss, entered April 8, 1986, is not reported. (App.11A). The trial court's February 9, 1987, final judgment appears in the Appendix at 16A.

JURISDICTION

The Virginia Supreme Court's opinion sustaining the validity of Virginia Code §8.01-265 was entered on June 9, 1989. Petitioner's requested rehearing was denied on September 22, 1989. (App.54A). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves an action under the Federal Employer's Liability Act (FELA) 45 U.S.C. §51 et seq. It also

involves the following Constitutional and statutory provisions:

Fourteenth Amendment of the United States Constitution

Virginia Code §8.01-257 (reprinted at App. 1)

Virginia Code §8.01-265 (reprinted at App. 2)

STATEMENT OF THE CASE AND RAISING THE FEDERAL QUESTION

Portsmouth, Virginia, has become a "happy hunting ground" for railroad employees suing under FELA, claiming job-related injuries occurring all over the continental United States. (App. 45A). Two-thirds (over 450) of the FELA cases filed in Portsmouth involved non-Virginians with out-of-state claims.[2/]

> The cases are numerous and constitute a substantial part

2/ From 1981 through November, 1989, 488 of the 731 FELA cases filed in Portsmouth involved non-Virginia plaintiff's whose incidents occurred outside Virginia. (App. 57A).

> of the judicial workload. The amounts in controversy are large, generating frequent appeals.

(App. 46A).[3/]

Seaboard, now CSX Transportation, a Virginia corporation, is the largest rail system east of the Mississippi River. Norfolk and Western Railway and Southern Railway, both Virginia corporations, together form the second largest railroad east of the Mississippi River. FELA plaintiffs from all over the East may sue these railroads in Virginia, regardless of the accident location, without fear of application of the doctrine of forum non conveniens.

3/ Justice Russell, dissenting, was joined by two others. The dissent noted: "One may only speculate as to the reasons for this phenomenon." 238 Va. at 158, 380 S.E.2d at 915-16. The answer is blatant and abusive forum-shopping. See Lowe v. Norfolk and Western R. Co., 124 Ill.App.3d 80, 463 N.E.2d 792 (Ill. App. Ct. 1984).

Respondent, William L. Caldwell, a Seaboard railroad employee and a North Carolina resident, came to Portsmouth's "happy hunting ground" seeking two million dollars under FELA for an injury that occurred in Charlotte, North Carolina. All material witnesses (except one independent physician) resided in or around Charlotte. Only two expert witnesses, selected by plaintiff shortly before trial, live in Virginia (Richmond, not Portsmouth). Seaboard's rail activities in Portsmouth had no relation to the incident.

Because Virginia has adopted the doctrine of forum non conveniens, Va. Code §8.01-257, Seaboard objected to venue early in the case and moved to dismiss based upon the doctrine of forum non conveniens. (App. 4A). Fortunately for Caldwell, as well as hundreds of other non-Virginian FELA plaintiffs,

Virginia prohibits the dismissal of a suit (conditional or otherwise) on the basis of forum non conveniens if the more convenient forum lies outside Virginia. Va. Code §8.01-265.[4/]

Seaboard argued that the non-dismissal provision of §8.01-265 of the Code of Virginia violated the United States Constitution. Therefore, Seaboard contended, because the provision was invalid, the court was free to apply the doctrine of forum non conveniens and

---

4/ Forty-three states have adopted the doctrine by judicial decision or statute. Only two states, Montana and West Virginia, by judicial decision, have refused to apply the doctrine of forum non conveniens to FELA cases. Haug v. Burlington N. R.R. Co., 770 P.2d 517 (Mont. 1989); Gardner v. Norfolk and W. Ry. Co., 372 S.E.2d 786 (W.Va. 1988). Virginia, having embraced the forum non conveniens doctrine, Va. Code §8.01-257, then completely emasculates it with the non-dismissal provision of §8.01-265. Virginia is the only state embracing the doctrine that has such a limitation. Moreover, Montana, in rejecting forum non conveniens in FELA cases, left the issue open for reconsideration if FELA forum-shopping became rampant. Haug, supra, 770 P.2d at 521.

dismiss the case under terms fair to both parties.[5/] The trial court held that the non-dismissal provision was constitutional and the doctrine of forum non conveniens could not be applied, even if desirable.[6/]

Following a trial, jury verdict, remittitur,[7/] and final judgment, Seaboard appealed to the Virginia Supreme Court, claiming, as to venue, that the "non-dismissal" provision of was unconstitutional and the trial court should have granted Seaboard's motion, without prejudice, based upon forum non conveniens.

5/ The court could conditionally dismiss or stay the case and put defendant on terms not to plead certain defenses, like the statute of limitations.

6/ The trial judge indicated such desirability. (App. 10A).

7/ The trial court's remittitur of $500,000.00 from the $1.5 million verdict (which Petitioner had challenged as excessive) was affirmed by the Virginia Supreme Court.

The Virginia Supreme Court, in a four-to-three decision, rejected the constitutional claims (including Virginia constitutional claims). With respect to Equal Protection and Due Process, the court determined that the statute could be sustained if supported by a rational basis. Applying this standard, the court found two rationales for distinguishing between in-state and out-of-state application of the doctrine of forum non conveniens.

The court first noted a significant distinction between a transfer and dismissal, the latter raising the risk of a subsequent statute-of-limitations defense. The court declined to minimize the risks judicially. Second, the court justified the non-dismissal provision on the ground that it furthered Virginia's policy of maximum court access evinced by the long-arm statute. To use forum

non conveniens to deny access to Virginia courts would frustrate that policy.

The three dissenters criticized the majority as departing from the salutary rule that "the parties to a lawsuit are entitled to a level playing field." (App. 48A). They found no rational basis for the non-dismissal provision. Illustrating the effect of the court's decision, the dissent discussed the anomaly of a case arising in Bristol, Virginia, or Bristol, Tennessee, neighboring cities located at the extreme southwest end of Virginia. If the FELA plaintiff seeks recovery in Portsmouth, and the incident occurred in Bristol, Virginia, Seaboard could, for good cause shown, have the case transferred to Bristol. If the accident occurs a mile down the line in Bristol, Tennessee, the railroad would be required to defend

itself in Portsmouth. This situation, the dissent stated, leads to results "as absurd as they are unfair." (App. 48A).

They then criticized the two rational bases offered by the majority. First, they noted that forum non conveniens assumed the availability of a second forum and the court's power to stay proceedings or condition dismissal until the availability of the more convenient forum could be tested. Second, they stated that forum non conveniens and long-arm jurisdiction needed to be harmonized and that long-arm jurisdiction was not relevant since Seaboard was a Virginia corporation. The dissent would have declared the statute unconstitutional as violating the Equal Protection Clause.

REASONS FOR GRANTING THE WRIT

> I do not think the United States would come to an end if

> we [the Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.
>
> Justice Oliver Wendell Holmes[8/]

Virginia is corporate home to the three largest railroads in the East, CSX Transportation, (formerly Seaboard and others), Norfolk and Western Railway and Southern Railway (the latter two are wholly-owned subsidiaries of Norfolk Southern Corporation, also a Virginia corporation). Their lines stretch from the East Coast to the Mississippi River (and past) and from Canada to Florida and the Gulf Coast. The non-dismissal provision allows injured employees from these railroads, regardless of their own residence and where the accident

---

8/ Quoted in R. Schnayerson, The Illustrated History of The Supreme Court of the United States, 63 (1986).

occurred, to come to Portsmouth's "happy hunting ground" and force the railroad to defend itself without regard to the cost and inconvenience of bringing records and witnesses from distant locations.

In Virginia, the doctrine of forum non conveniens has been adopted by statute. Va. Code §8.01-257 (1984).[9/] The doctrine is also an integral part of Federal law. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); 28 U.S.C. §1404(a). The fact that this is an FELA case does not alter the applicability of the doctrine of forum non conveniens. Missouri ex rel. Southern Ry. Co. v. Mayfield, 340 U.S. 1 (1950). Here, Virginia has statutorily recognized the policy of

---

9/ Section 8.01-257 states in pertinent part: "[E]very action shall be commenced and tried in a forum convenient to the parties and witnesses, where justice can be administered without prejudice or delay." Va. Code §8.01-257 (1984).

applying the doctrine. Va. Code §8.01-257. However, the non-dismissal provision takes away a large part of what the General Assembly granted in §8.01-257. Because of §8.01-265, the fact that this FELA case was filed in state court and involves an accident occurring outside the state, the doctrine of forum non conveniens is unavailable. Paradoxically, this means that Virginia refuses to apply the doctrine in those cases where plaintiff's forum choice is most inconvenient. This legislative distinction is wholly irrational.

DENIAL OF EQUAL PROTECTION AND DUE PROCESS

Fourteenth Amendment Due Process and Equal Protection require that the classification in §8.01-265, distinguishing between in-state transfers and out-of-state dismissals, must be rationally related to a legitimate state

interest. Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). Section 8.01-265 of the Virginia Code violates the Equal Protection and Due Process clauses of the Fourteenth Amendment by making an arbitrary, unreasonable, and irrational classification which permits one group of individuals the right to invoke the doctrine of forum non conveniens while denying this same right to another group of similarly situated individuals.

The non-dismissal provision of §8.01-265 wholly fails to meet the rational basis test for Equal Protection and Due Process. Rather, it is totally irrational, as evidenced by the example using the neighboring cities of Bristol, Virginia, and Bristol, Tennessee. The statute perversely refuses to acknowledge and apply the doctrine of forum non conveniens when it is most warranted --

when the convenient forum is in another state.

The Virginia Supreme Court advances two rational bases for the non-dismissal provision of §8.01-265. The court first cited the risk of an adverse statute-of-limitations ruling in the alternate jurisdiction as a reason justifying the distinction between an in-state transfer and a dismissal. Second, the majority justified the non-dismissal provision as extending Virginia's long-arm jurisdiction statutes to their due process limits.

A. THE RISKS ASSUMED IN DISTINGUISHING BETWEEN IN-STATE TRANSFERS AND DISMISSALS ARE ILLUSORY.

The Virginia Supreme Court first notes that if dismissal is permitted, a plaintiff may run afoul of the statute of limitations. This concern is wholly irrational.

The application of the doctrine of forum non conveniens always assumes the availability of an alternate forum. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947). Courts applying the doctrine have uniformly protected plaintiffs against the "risks" posited by the Virginia Supreme Court. Burnett v. New York Central R.R. Co., 380 U.S. 424, 430 (1965); Lowe v. Norfolk and Western Ry. Co., 124 Ill.App.3d 80, 463 N.E.2d 792, 800-01 (App.Ct.), petition for leave to appeal denied, 467 N.E.2d 582 (Sup.Ct. Ill. 1984). For instance, in Lowe, the Illinois court conditioned its dismissal on Norfolk and Western agreeing to accept service of process from the more convenient court and to waive any possible statute-of-limitations defense. Similarly, the court has the inherent power to stay its proceedings until the plaintiff is properly before the more

convenient court. In light of the availability of these devices, the Virginia Supreme Court's stated concerns are irrational.

This Court's holding in Burnett v. New York Central R.R. Co., 380 U.S. 424 (1965), supports the protection afforded plaintiffs. In Burnett, the Court held that if an FELA plaintiff files a case in an improper venue and obtains jurisdiction over the defendant, but the court dismisses the case because of the improper venue, then the FELA statute of limitations is tolled for a limited time. Given the broad remedial policy underlying FELA, the Court reasoned that where the plaintiff did everything necessary to put the parties at issue, except in the wrong forum, then the limitation period is tolled.

By analogy, if that same plaintiff did all that was necessary to put the

parties at issue in a proper but inconvenient forum, under the Burnett rationale, the plaintiff would be entitled to the same (if not more) protection from the statute of limitations. Thus, even if a dilatory plaintiff commenced the FELA suit in an inconvenient forum on the day before the running of the statute of limitations, the time during which the suit was pending, as well as any time during which an appeal could be taken or an appeal was pending, tolls the statute of limitations. Burnett, 380 U.S. at 434-35. In addition, the Virginia Supreme Court overlooks the availability of state tolling and savings statutes in non-FELA cases. Id. at 431-33. Thus, the risk of dismissal to a plaintiff posited by the Virginia Supreme Court is non-existent, and the court's first concern has no rational basis.

B. THE NON-DISMISSAL PROVISION CONTRIBUTES NOTHING TO EXTEND MAXIMUM ACCESS TO VIRGINIA COURTS UNDER THE LONG-ARM STATUTES

The Virginia Supreme Court also justifies the non-dismissal provision of §8.01-265 as further effectuating Virginia's policy of granting broad access to its courts through the long-arm jurisdiction statutes, Va. Code §8.01-328.1, et seq. In essence, the court holds that once the trial court acquires personal jurisdiction over a non-resident defendant possessing the due process-required "minimal contacts" with Virginia, the non-dismissal provision insures that jurisdiction is retained within the Commonwealth.

Virginia's long-arm statute and the United States Constitution give the Commonwealth's courts the power to exercise personal jurisdiction over non-residents under certain circumstances.

The purpose of the long-arm statute is to protect and give Virginia residents the ability to sue and obtain jurisdiction over non-resident persons (including corporations) for wrongful acts affecting those Virginia residents within the Commonwealth. Carmichael v. Snyder, 209 Va. 451, 455-56, 164 S.E.2d 703, 707 (1968). Significantly, all of the long-arm jurisdiction circumstances require some connection with the Commonwealth of Virginia. See Va. Code §8.01-328.1, A, sub-paragraphs 1-5 (Cum.Supp. 1987).[10/] The court's power to exercise personal jurisdiction, and not the location of the trial, lies at the heart of Virginia's long-arm statutes. The court's logic renders the non-dismissal provision of §8.01-265 superfluous, not supplementary, since

---

10/ Sub-paragraphs 6 through 9 of the long-arm statute are particularly local.

long-arm personal jurisdiction requires relation to the Commonwealth of Virginia, thereby establishing some convenience of forum without the necessity of the non-dismissal provision.

In the factual context of this case, neither the plaintiff nor his cause of action have any relationship whatsoever to the Commonwealth of Virginia. It is only by FELA's jurisdiction statute, 45 U.S.C. §56, that plaintiff acquired jurisdiction over Seaboard in Portsmouth, not by virtue of Virginia's long-arm statutes. Furthermore, plaintiff would never even have to resort to the long-arm jurisdiction statute where the defendant, like Seaboard, is a Virginia corporation.[11/]

[11/]The two other major eastern railroads, Norfolk and Western Railway and Southern Railway, are also Virginia corporations.

The absence of the non-dismissal provision would in no way limit or deny the access to Virginia courts provided by the long-arm statutes; plaintiffs would not be limited in acquiring personal jurisdiction over non-resident defendants. Rather, it would only limit, at the court's discretion, non-residents (non-taxpayers) from importing their foreign causes of action at the expense of Virginia citizens. Indeed, the non-dismissal provision of §8.01-265 adds nothing to the scope of personal jurisdiction created by Virginia's long-arm statutes.

Admittedly, the legislature has power to make venue provisions, so long as these provisions do not, by arbitrary and unreasonable discrimination, violate the fundamental guarantees of the Equal Protection Clause. But to comply with Due Process and Equal Protection, the

classification must be based on real and substantial differences having a reasonable relation to the subject of the particular legislation. Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927).

The distinction in the Virginia statute is simply whether the more convenient forum is in this state [the doctrine of forum non conveniens is to be applied] or in another state [the doctrine cannot be applied]; such a distinction has no relationship to any state purpose, to principles of fair play or to the purpose of Virginia's own venue provisions. The distinction results in the arbitrary retention of those cases which would leave the Commonwealth if the doctrine of forum non conveniens was fairly and properly applied.

The realistic application of the non-dismissal provision, American

Motorists Ins. Co. v. Starnes, 425 U.S. 637 (1976), places Seaboard at an appreciable disadvantage: lack of compulsory process to obtain the Charlotte treating physician's presence; the expense of bringing Charlotte witnesses to Portsmouth for trial. The reality of the non-dismissal provision is discriminatory to FELA defendant railroads in not being able to assert the doctrine of forum non conveniens. As the classification is wholly unrelated to any legislative object, it violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the statute must be struck down. Reed v. Reed, 404 U.S. 71 (1971).

CONCLUSION

The petition for a writ of certiorari should be granted, and the decision below should be reversed as to the constitutionality of the non-dismissal

provision, and remanded with direction to determine the applicability of the doctrine of forum non conveniens in this case.

Respectfully Submitted,

SEABOARD SYSTEM
RAILROAD, INC.

BY: Samuel J. Webster
Of Counsel

William T. Prince
Edward L. Oast
Samuel J. Webster
WILLIAMS, WORRELL, KELLY,
GREER & FRANK, P.C.
600 Crestar Bank Building
Five Main Plaza East
Post Office Box 3416
Norfolk, Virginia 23514-3416
(804) 624-2600

Counsel for Petitioner
December 21, 1989

CERTIFICATE OF SERVICE

In accordance with Rule 28.2 and 28.3, I hereby certify that I have served three (3) copies of this Petition for Writ of Certiorari upon the Respondent, William L. Caldwell, at the office of his counsel of record, Eddie W. Wilson, WILSON & ASSOCIATES, P.C ., 2200 Colonial Avenue, Suite 12-B, Post Office Box 11168, Norfolk, Virginia 23517, and Professor George Rutherglen, Professor of Law, University of Virginia School of Law, Charlottesville, Virginia 22901, pursuant to the requirements of Rules 28 and 33 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with first class postage prepaid, addressed to Respondents as set forth above, on or before December 21, 1989.

I further certify that I am a member of this Court, and that all parties

required to be served have been served on or before December 21, 1989.

RULE 28.4(c) STATEMENT

Because the constitutionality of Virginia Code §8.01-265 is drawn into question in the Petition for a Writ of Certiorari, 28 U.S.C. §2403(b) may be applicable, and a copy of this Petition has been served on the Attorney General of Virginia, the Honorable Mary Sue Terry.

Samuel H. Webster
Counsel for
Seaboard System
Railroad, Inc.

COMMONWEALTH OF VIRGINIA, AT LARGE, to-wit:

Subscribed and sworn to before me this 20th day of December, 1989.

Belinda S. Hood
Notary Public

My Commission Expires:
March 12, 1993

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SEABOARD SYSTEM RAILROAD, INC.,

Petitioner,

V.

WILLIAM L. CALDWELL,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI

APPENDIX INDEX

Virginia Code §8.01-257

§8.01-257. Venue generally. -- It is the intent of this chapter that every action shall be commenced and tried in a forum convenient to the parties and witnesses, where justice can be administered without prejudice or delay. Except where specifically provided otherwise, whenever the word "action(s)" is used in this chapter, it shall mean all actions at law, suits in equity, and statutory proceedings, whether in circuit courts or district courts. (1977, c. 617.)

Virginia Code §8.01-265

§8.01-265. Transfer of venue by court. -- In addition to the provisions of §8.01-264 and notwithstanding the provisions of §§8.01-195.4, 8.01-260, 8.01-261 and 8.01-262. The court wherein an action is commenced may, upon motion by any defendant and for good cause shown, transfer the action to any fair and convenient forum having jurisdiction within the Commonwealth, or the court, on motion of a plaintiff and for good cause shown, may retain the action for trial. Except by agreement of all parties, no action . . . . shall be transferred to or retained by a forum not enumerated in such category, nor shall any action brought in a permissible forum pursuant to §8.01-262 be dismissed on the basis that there is a more convenient forum in a jurisdiction other than in the

Commonwealth of Virginia. Good cause shall be deemed to include, but not to be limited to, the agreement of the parties or the avoidance of substantial inconvenience to the parties or the witnesses.

VIRGINIA:
IN THE CIRCUIT COURT FOR THE
CITY OF PORTSMOUTH

WILLIAM L. CALDWELL,

Plaintiff,

V. AT LAW
NO. L-86-127

SEABOARD SYSTEM RAILROAD, INC.,

Defendant.

OBJECTION TO VENUE
AND MOTION TO DISMISS

The defendant, Seaboard System Railroad, Inc., objects to venue in this court and moves to dismiss this action for improper venue, and in support of this motionk comes and says:

1. Chapter 5 of Title 8.01, Code of Virginia, titled "Venue", states: "It is the intent of this chapter that every action shall be commenced and tried in a forum convenient to the parties and witnesses, where justice can be administered without prejudice or delay." Va. Code §8.01-257.

2. This forum is not convenient either to the parties or the witnesses:

(a) The alleged accident occurred in Charlotte, North Carolina, and the cause of action arose in that place;

(b) It is believed that the plaintiff resides in or around Charlotte, North Carolina;

(c) Probably all of the potential liability witnesses reside in or around Charlotte, North Carolina;

(d) The plaintiff received all of his medical care by physicians in Charlotte, North Carolina.

3. Seaboard System Railroad, Inc. is amenable to process of state and federal courts in and for Charlotte, North Carolina, where the cause of action arose.

4. Plaintiff's accident and cause of action did not arise out of any of

the affairs or business activities of the defendant within the City of Portsmouth, and no connection exists between said accident or cause of action and any business of Seaboard System Railroad, Inc. within the jurisdiction of this court.

5. The maintenance of this action in this court would be vexatious and oppressive to the defendant, would offend traditional notions of fair play and substantial justice, and would effectively deny defendant due process and equal protection of law, all in violation of the Constitutions of the United States and the Commonwealth of Virginia.

6. If the statutes of the Commonwealth of Virginia are construed to allow plaintiff to institute and maintain this action in this court, then said statutes as applied would violate

the provisions of the Constitutions of the United States and of this Commonwealth in that they would deny defendant equal protection of laws and due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States.

7. This court is without jurisdiction of this action against this defendant and no proper venue exists in this court.

WHEREFORE, defendant, Seaboard System Railroad, Inc., moves to dismiss this action since the venue statutes of the Commonwealth of Virginia, if construed to permit this action, would violate the Constitutions of the United States and this Commonwealth.

MOTION TO STAY
FURTHER PROCEEDINGS

The defendant further moves the Court to stay further proceedings in

this action because there is currently pending in the Circuit Court of Jefferson County, Alabama Civil Action No. CV84-6021, which is the same cause of action as alleged herein.

SEABOARD SYSTEM
RAILROAD, INC.

Exhibit A, Attached to
Defendant's Brief in Support
of Objection to Venue and
Motion to Dismiss - Filed
March 28, 1986

EXHIBIT A

The plaintiff, a resident of Charlotte, North Carolina, was a 41 year old switchman on April 4, 1984 when he alleges he suffered a hearing loss while working for the defendant in Charlotte. All known liability and medical witnesses live in and around Charlotte.

Excerpts from Transcript
of Hearing on Defendant's
Objection to Venue and Motion
to Dismiss, held April 2, 1986

THE COURT: But if this was in the federal court, there is no question they would send it down to Florida.

MR. MILLER: Absolutely, one hundred percent, your Honor.

MR. WILSON: We keep saying Florida, but it is North Carolina.

VIRGINIA:
IN THE CIRCUIT COURT FOR THE
CITY OF PORTSMOUTH

WILLIAM L. CALDWELL,

Plaintiff,

V. AT LAW
NO. L-86-127

SEABOARD SYSTEM RAILROAD, INC.,

Defendant.

ORDER

This cause came on upon the defendant's Objection to Venue and Motion to Dismiss and was argued by counsel;

And after consideration of the brief filed by the defendant in support of its motion and the brief filed by the plaintiff, and the arguments of counsel, the Court being of the opinion that the provision of §8.01-265 of the Code of Virginia prohibiting the dismissal of this action on the ground of forum non conveniens violates neither Article I,

Section 11, Article IV, Section 14, Paragraph 18 or Article IV, Section 15 of the Constitution of Virginia;

It is ORDERED that the motion of the defendant to dismiss this action without prejudice is DENIED, to which action of the Court the defendant objects.

And came also the parties on the motion of the defendant to stay the proceedings in this action on the ground that the plaintiff has an identical cause of action against the defendant pending in the Circuit Court of Jefferson County, Alabama or in the alternative to order the plaintiff to take no further action in this cause in Alabama, and was argued by counsel, and the Court being of the opinion that the plaintiff can proceed with each pending action, DENIES the motion, to which

action of the Court the defendant objects.

It is further ORDERED that the defendant shall have fifteen (15) days from the entry of this Order to file its responses to the pleadings served.

IN THE CIRCUIT COURT FOR THE
CITY OF PORTSMOUTH

WILLIAM L. CALDWELL,

Plaintiff,

V. AT LAW
NO. L-86-127

SEABOARD SYSTEM RAILROAD, INC.,

Defendant.

On this the 25th day of November, 1986, came the parties again in person and by their Attorneys and Court convened as of its adjournment of Tues Nov. 24th, 1986, and the jurors sworn to by the issue joined in this case appeared in Court according to their adjournment and after fully hearing all the evidence, the plaintiff, by counsel, again moved the Court to enter Summary Judgment in favor of the plaintiff, for reasons stated in the record, and said motion being heard, the Court doth overrule; and after fully hearing the argument of counsel, the jury retired to

their room to consult of their verdict and after sometime returned into Court having found the following verdict: "We, the jury, find for the plaintiff and assess his damages at $1,500,000.00 signed Jeffrey Neal Joyner, Foreman." 11-25-86, whereupon the defendant, by counsel, moved the Court to set the verdict of the jury aside and to grant it a new trial on the grounds that said verdict is contrary to the law and the evidence, for reasons stated in the record, and the Court doth continue the case generally.

VIRGINIA:
IN THE CIRCUIT COURT FOR THE
CITY OF PORTSMOUTH

WILLIAM L. CALDWELL,

Plaintiff,

V. AT LAW
NO. L-86-127

SEABOARD SYSTEM RAILROAD, INC.,

Defendant.

On this 2nd day of February, 1987, came again the parties by their attorneys and the Court having fully heard the motion of the defendant to set aside the verdict of the jury heretofore rendered herein, and to grant it a new trial on the grounds that said verdict is contrary to the law and the evidence, which motion the Court doth overrule; and said plaintiff is Ordered to remit $500,000.00 of said verdict and plaintiff by letter to this Court has consented to said remitter, judgment is entered on behalf of the plaintiff in

the sum of One Million Dollars ($1,000,000.00) with interest thereon to be computed at the rate of twelve per cent per annum from the 24th day of November, 1986, till paid and costs and this cause is removed from the docket of the Court.

VIRGINIA:
IN THE CIRCUIT COURT FOR THE
CITY OF PORTSMOUTH

WILLIAM L. CALDWELL,

Plaintiff,

V. AT LAW
NO. L-86-127

SEABOARD SYSTEM RAILROAD, INC.,

Defendant.

On this 2nd day of February, 1987, came again the parties by their Attorneys and the Court having fully heard the motion of the defendant to set aside the verdict of the jury heretofore ordered herein, and to grant it a new trial on the grounds that said verdict is contrary to the law and the evidence, which motion the Court doth overrule; and said plaintiff is Ordered to remit $500,000.00 of said verdict and plaintiff by letter to this Court has consented to said remitter, judgment is entered on behalf of the plaintiff in

the sum of One Million Dollars ($1,000,000.00) with interest thereon to be computed at the rate of twelve per cent per annum from the 24th day of November, 1986, till paid and costs and this cause is removed from the docket of this Court.

****

IN THE SUPREME COURT OF VIRGINIA

Seaboard System Railroad, Inc.,

Appellant,

against Record No. 870490

Circuit Court No.

L-86-127

William L. Caldwell,

Appellee.

From the Circuit Court of the City of Portsmouth

Upon the petition of Seaboard System Railroad, Inc. an appeal is awarded it from a judgment rendered by the Circuit Court of the City of Portsmouth on the 9th day of February, 1987 in a certain motion for judgment then therein depending, wherein William L. Caldwell was plaintiff and the petitioner was defendant.

And it appearing that and appeal bond in the penalty of $1,000,000, has

heretofore been given, no additional bond is required.

This appeal, however, is limited to the consideration of assignment of error No. 1 which reads as follows:

1. The trial court erred in denying Seaboard's motion to dismiss because of the unconstitutionality of Code §8.01-265.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignment of error No. 1, and the briefs to be filed shall be limited to such discussion as is relevant to the assignment of error upon which this appeal is awarded.

The petition for appeal is refused as to the remaining assignments of error.

PRESENT: ALL THE JUSTICES

OPINION BY JUSTICE WHITING

June 9, 1989

Record No. 870481

WILLIAM L. CALDWELL

V.

SEABOARD SYSTEM RAILROAD, INC.

FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

Lester E. Schlitz, Judge

Record No. 870490

SEABOARD SYSTEM RAILROAD, INC.

V.

WILLIAM L. CALDWELL

FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

Lester E. Schlitz, Judge

In one of these two appeals (Record No. 870490), we decide the constitutionality of that part of the forum non conveniens statute, Code

§8.01-265, which precludes dismissal of actions arising in jurisdictions other than Virginia[1/]. In the other appeal (Record No. 870481), should we hold that provision constitutional, we determine whether the trial court erred in requiring the plaintiff to remit $500,000 of a $1,500,000 verdict awarded him.

On April 4, 1984, William L. Caldwell, a North Carolina resident and employee of Seaboard System Railroad, Inc. (Seaboard), was alighting from a Seaboard locomotive to throw a switch in

---

[1/]Code §8.01-265 provides in pertinent part that: the court wherein an action is commended may, upon motion by any defendant and for good cause shown, transfer the action to any fair and convenient forum having jurisdiction within the Commonwealth . . . [but no] action brought in a permissible forum pursuant to §8.01-262 [shall] be dismissed on the basis that there is a more convenient forum in a jurisdiction other than in the Commonwealth of Virginia.

its Charlotte, North Carolina, rail yard when the locomotive's horn was sounded near his ear, causing a hearing loss and other disabilities. On February 12, 1986, Caldwell filed this personal injury action against Seaboard in the court below pursuant to the Federal Employers' Liability Act. 45 U.S.C. §§51-60 (1982),

Because Seaboard regularly and systematically conducted business activity in the City of Portsmouth, Portsmouth was a permissible venue under Code §8.01-262. Seaboard filed an objection to venue and a motion to dismiss, contending that: (1) the Circuit Court of the City of Portsmouth was not a convenient forum; and (2) the appropriate court in Charlotte, North Carolina, where the cause of action arose, would be a more convenient forum. The trial court denied the motion,

citing Code §8.01-265. Thereafter, the case was tried to a jury, which returned a $1,500,000 verdict for Caldwell. The trial court required Caldwell to remit $500,000 of the verdict, or submit to a new trial. Caldwell accepted the remittitur under protest and appealed. Seaboard appealed the order denying its motion to dismiss. We granted both appeals, and we will dispose of the constitutional challenge first.

Denial of Motion to Dismiss (Record No. 870490)

Seaboard concedes that the Commonwealth is not constitutionally required to give any defendant the right to seek to have a case transferred to a more convenient forum,[2/] but argues that

---

[2/]This doctrine, known as forum non conveniens, originated in eighteenth century Scotland. W. Gloag and R. Henderson, Introduction to the Law of

Footnote continued on next page.

if the legislature adopts a statute giving such a right to defendants sued on Virginia causes of action, it must extend that right to defendants sued on causes of action arising outside Virginia. Specifically, Seaboard maintains that the part of Code §8.01-265 which prevents trial courts from dismissing any out-of-state actions on the grounds of forum non conveniens, violates several provisions of the Virginia and United States

---

Footnote continued from previous page.

Scotland 22 (3d ed. 1939). It permitted a court, in its sound discretion, to decline to exercise its jurisdiction even though the plaintiff brought his action in a proper jurisdiction and venue. It did not contemplate a transfer of the case to another forum, but rather its dismissal. It is applied where a more appropriate forum is available, and the defense is so handicapped by the difficulties and cost of trying the case in a forum as to make a trial unfair to the defendant or burdensome to the public interest. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-09 (1947).

Constitutions. Seaboard's primary contention is that there is no rational basis for applying forum non conveniens to causes of action arising in Virginia, but not those arising outside the Commonwealth.

[1] We consider Seaboard's constitutional attack against the background of our previous decisions. Every statute "carries a strong presumption of validity," and unless it "clearly violates a provision of the United States or Virginia Constitutions, we will not invalidate it." City Council v. Newsome, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984).

> [T]he party assailing the legislation has the burden of proviing that it is unconstitutional, and if a reasonable doubt exists as to a statute's constitutionality, the doubt must be resolved in favor of its validity. Indeed, because '[a] judgment as to the wisdom and propriety of a statute is within the legislative prerogative,'

> courts will declare legislation invalid only when it is 'plainly repugnant to some provision of the state or federal constititon.'

Etheridge v. Medical Center Hospitals, 237 Va. 87, 94, 376 S.Ed.2d 525, 528 (1989)(citations omitted).

[2-3] "The necessity for and the reasonableness of [a] classification are primarily questions for the legislature . . . . The presumption is that the classification is reasonable and appropriate and that the act is constitutional unless illegality appears on its face." Mandell v. Haddon, 202 Va. 979, 989, 121 S.E.2d 516, 524 (1961). Because this statute does not affect fundamental rights, it is not subject to strict scrutiny to determine if it is necessary to promote a compelling or overriding governmental interest; instead, we review it to see that it is neither arbitrary nor

discriminatory, and that it bears a reasonable relation to a proper purpose. Etheridge, 237 Va. at 97, 376 S.E.2d at 530.

With those principles in mind, we consider the statute and its purposes.[3/] Are there rational reasons for different treatment of causes of action arising within the state and those arising elsewhere? We believe there are at least two such reasons, either of which would supply a rational basis for a different treatment.

[4] First, there is a significant distinction between the transfer of an action and its dismissal. Dismissal

---

[3/] Because the statute is unambiguous, we do not consider its legislative history, Peery v. Board of Funeral Directors, 203 Va. 161, 165, 123 S.E.2d 94, 97 (1961), nor will we consider the motives of any particular legislator, as suggested by Seaboard, Blankenship v. City of Richmond, 188 Va. 97, 105, 49 S.E.2d 321, 324 (1948).

involves a risk that a plaintiff may not be able to assert his right of action in another court because of the bar of the statute of limitations or some other reason. There is no such risk in the transfer of cases within the state. Seaboard suggests several ways to minimize those rights. But these arguments are more appropriately addressed to the legislature. See Heublein, Inc. v. Alcoholic Beverage Control Dept., 237 Va. 192, 201, 376 S.E.2d 77, 81 (1989).

[5] Second, in the adoption of Code §§8.01-328 to - 330, the legislature evinced a policy of extending the jurisdiction of its courts to the maximum extent permitted by the Due Process Clause of the United States Constitution. Kolbe, Inc. v. Chromodern, Inc., 211 Va. 736, 740, 180 S.E.2d 664, 667 (1971). The use of

forum non conveniens to deny the access to Virginia courts provided by those statutes reduces the jurisdiction of Virginia courts and, therefore, affects that policy. The reconciliation of these competing policies is a matter of legislative discretion.[4/] Wood v. Board of Supervisors of Halifax Cty., 236 Va. 104, 115, 372 S.E.2d 611, 618 (1988).

[6] Finding a rational basis for the statute, we conclude that it violates neither the Fourteenth Amendment Equal Protection Clause, see Reed v. Reed, 404 U.S. 71, 76 (1971), nor the Fourteenth Amendment Due Process Clause, Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955); Etheridge, 237 Va. at 97, 376 S.E.2d at 530. For the same reason, we find no violation of the

---

[4/]For the same reason, we find no merit in Seaboard's argument that retention of actions arising outside Virginia unduly burdens the Virginia courts.

Due Process Clause of the Constitution of Virginia, Article I, §11, Etheridge, 237 Va. at 97, 376 S.E.2d at 530, or its prohibition against special or private laws, Article IV, §§14 and 15, see Peery v. Board of Funeral Directors, 203 Va. 161, 166-67, 123 S.E.2d 94, 98 (1961).

[7] We need not consider Seaboard's contention that its rights under the Fourteenth Amendment Privileges and Immunities Clause have been violated. Corporations have no rights under that clause. Asbury Hospital v. Cass County, 326 U.S. 207, 210-11 (1945).

[8] Next, Seaboard contends that the statute impermissibly burdens interstate commerce. Again, we review general principles before considering the specific issue.

> [I]n the absence of conflicting legislation by Congress, there is a residuum of power in the state to make

> laws governing matters of local concern which nevertheless in some measure affect interstate commerce . . . . When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation . . . . such regulation has been generally held to be within state authority.

Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945)(citations omitted).

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)(citation omitted).

State statutes which "burden interstate transactions only incidentally . . . . violate the Commerce Clause only if the burdens they impose on interstate trade are 'clearly excessive in relation to putative local benefits.'" Maine v. Taylor, 477 U.S. 131, 138 (1986). Neither party cites a case in which Commerce Clause considerations were discussed in relation to choice of a forum for litigation.

[9] In our opinion, the attenuating effects, if any, upon interstate commerce inherent in the application of this statute are slight, and are clearly overborne by a legitimate state interest in providing maximum access to its courts. Thus, we find no merit in the argument that interstate commerce is impermissibly burdened by the statute.

For the foregoing reasons, we will affirm the action of the trial court in denying the motion to dismiss.

Requirement of Remittitur

(Record No. 870481)

[10] Because we have sustained the trial court's action in denying the motion to dismiss, we decide whether it abused its discretion in requiring Caldwell to remit $500,000 of the $1,500,000 verdict. Code §8.01-383.1 "tacitly recognized and implicitly ratified" the common law power of a trial court to exercise its sound discretion in requiring remittitur in a proper case. Bassett Furniture v. McReynolds, 216 Va. 897, 910, 224 S.E.2d 323, 331 (1976). Indeed, it is the trial court's duty to require remittitur where appropriate. Edmiston v. Kupsenel, 205 Va. 198, 202, 135 S.E.2d 777, 780 (1964). The issue here is

whether the trial court has properly done so and given sufficient supporting reasons.

Caldwell has recovered a jury verdict. Therefore, in accord with familiar appellate principles, we view the facts in the light most favorable to him.

Caldwell testified that, just after the horn was sounded, he felt lightheaded and dizzy and, later, his ears started ringing and popping, and he had a bad headache. The train master took him to a clinic in Charlotte where Doctor Beard gave him a pain reliever, told him to stay away from loud noises until the ringing and popping stopped, and referred him to Doctor Coconus, described by Caldwell as an "ear doctor." Although Caldwell saw Dr. Coconus twice in a three-month period following his injury, he has been

treated since by a Charlotte otolaryngologist of his choice.

Caldwell complains that his ears wake him at night. He testified that "they pop on me." "They still give me headaches [and] make me lightheaded at times." He cannot stay in a room or place with many people. Because the service at his church becomes "really loud at times," he has to attend his wife's church instead. At home he has problems with his family because: (1) in order to hear the television, he must increase its volume to a level too high for other members of the family; and (2) he does not answer the telephone in the next room because he cannot hear it. Because he gets lightheaded at times, he has difficulty in taking steps. Furthermore, Caldwell says that he has not been allowed to return to work at

Seaboard because of his hearing difficulties.

Expert witnesses indicated that the horn blast was at a noise level substantially in excess of maximum noise levels an ear can tolerate without injury to hearing and balance. This resulted in a permanent hearing loss in high frequency ranges of 22 1/2 percent in Caldwell's right ear and 7 1/2 percent in his left ear, and significantly reduced his ability to understand what is being said in the presence of the background noise associated with a church or social function. This loss will increase in the normal aging process, and further exposure to excessive noise will cause more damage to Caldwell's hearing.

An expert also testified that when Caldwell is quiet, in reading or trying to sleep, he has tinnitus, or a constant

ringing in his ears. The hearing loss also causes recruitment, which is an abnormal increase in loudness or adverse reaction to loud sounds. Thus, when sounds are made loud enough for Caldwell to hear, they seem too loud to him, and will also be distorted. His sense of balance has also been affected. Caldwell's disabilities render him unemployable by Seaboard.

Caldwell will have to be fitted with a hearing aid in each ear, at a cost of $500 to $700 each, and undergo annual audiological examinations at a cost of $40 to $60 each. In the last full year Caldwell worked, he earned $28,481.74, and was entitled to fringe benefits of $9,670.80 per year. He lost $37,687 in wages up to the date of trial.

Before the trial court ruled, it indicated that it considered: (1) the

highest estimated percentage of Caldwell's hearing loss in the high frequency ranges, and his consequent disqualification from railroad work; (2) the estimate of an overall hearing disability of slightly less than two percent; (3) the fact that he could no longer work around loud noises; (4) evidence of tinnitus and of popping in Caldwell's ears; (5) the fact that Caldwell appeared to have no difficulty in hearing while he was testifying; and (6) its review of reported cases involving remittitur of verdicts awarding damages for hearing losses. Recognizing: (1) the difficulty in fixing damages for pain and suffering; (2) the fact that it is "basically a jury question"; (3) that it is "fundamental" that a court should not impose its judgment unless the verdict "is just so outrageous as to shock the

conscience of the court"; but also (4) its duty to set aside a verdict or impose a remittitur upon the plaintiff in an appropriate case, the trial court concluded that remittitur was required in this case.

[11] In sustaining a trial court's remittal order in Bassett Furniture, 216 Va. at 912, 224 S.E.2d at 332 (quoting Hoffman v. Shartle, 113 Va. 262, 264, 74 S.E. 171, 172 (1912)), we said that "the record must show the grounds relied on in support of such action, otherwise it cannot be upheld." Although Caldwell argues that Bassett Furniture requires a trial court to go down "a laundry list" of the grounds assigned by the Bassett Furniture trial court to support its order of remittal, we have not made those grounds talismanic. The trial court's conclusion that the damages are excessive does not have to be supported

by express statements that the damages are so excessive as to shock the conscience, or that the size of the verdict created an impression that the jury had been influenced by passion or prejudice, or that the jury had misconceived or misinterpreted the facts or the law, if one or more of those factors may be fairly inferred from the reasons given for its action.

[12] In our opinion, the reasons the trial court assigned for remittitur sufficiently indicate its grounds and demonstrate that it "considered factors in evidence relevant to a reasoned evaluation of the damages incurred and to be incurred [and its order] will not be disturbed on appeal if the recovery after remittitur bears a reasonable relation to the damages disclosed by the evidence." Id. at 912, 224 S.E.2d at 332.

Caldwell argues that no such reasonable relation exists here. In our opinion, however, the jury could not have concluded that Caldwell had an economic loss greater than $291,427.59. It was comprised of: (1) $37,687.79 wages lost up to the date of trial; (2) the loss of an expected annual $9,670.80 in fringe benefits, for the balance of the 26 years he could have worked for the railroad until his mandatory retirement at age 70, for a total of $251,440.80 (not discounted to present value); and (3) what the parties apparently agreed were projected medical expenses of about $2,300. Therefore, the balance, exceeding $1,200,000, must have been for pain, suffering, and partial disability.

Even though Caldwell did not prove what his future wage losses would have

been,[5/] he argues that the evidence of future economic losses, pain, suffering, and disability clearly justify an award for those elements of over $1,200,000, and, thus, make the trial court's reduction of the award manifestly unreasonable. We do not agree.

Caldwell's injury and disability have affected him, but the evidence does not indicate a substantial amount of pain, suffering, or embarrassment arising out of the hearing loss. Recognizing that Caldwell's employment and social activities will be somewhat limited by his hearing and balance impediments, the evidence does not indicate that he will not be able to find another job, or participate in most

---

[5/] Because Caldwell was only partially disabled, the trial court held that such proof was inadmissible in the absence of evidence showing what he might have made in other employment. Caldwell assigned no error to this ruling.

family and social activities not involving loud noises or requiring the ability to hear normally. Therefore, we cannot say the trial court's reduction of the jury's award was unreasonable. Accordingly, we will affirm its order of remittitur.

Record No. 870481 - Affirmed.

Record No. 870490 - Affirmed.

Justice Russell, with whom Justice Compton and Justice Thomas join, dissenting.

The records of this Court indicate that FELA plaintiffs have found a happy hunting ground in Portsmouth. Attorneys representing railroad employees claiming job-related injuries occurring all over the continental United States apparently think it worthwhile to bring actions against railroads in Portsmouth, or in neighboring Norfolk, rather than in the

localities in which the accident occurred.* One may only speculate as to the reasons for this phenomenon.

The cases are numerous and constitute a substantial part of the local judicial workload. The amounts in controversy are large, generating frequent appeals. Our hospitality to this nationwide litigation imposes a significant burden upon Virginia taxpayers.

*A fair example of such a case, having no relation to Virginia, was Stephen R. Thomas v. Seaboard System Railroad, Inc., Record No. 870300, in which we denied an appeal in January 1988. There, the plaintiff was a brakeman riding in a caboose travelling from Danville, Illinois to Evansville, Indiana. Alleging that he had slipped on a wet floor in the caboose, he

brought suit against the railroad in Portsmouth, Virginia, claiming $3,000,000.00 in damages.

The record in the present case indicates that of 201 FELA cases filed in Portsmouth during the years of 1981-1986, 141 cases alleged accidents which occurred outside Virginia.

Against that background, the railroads contend that they are disadvantaged by being required to transport their witnesses and records across the country in order to stand trial on a battleground of their opponents' choosing, where they perceive temselves to be regarded as "target" defendants. Under the statute complained of here, they may not invoke the protection of forum non conveniens and under the FELA they cannot remove the case to a federal court. The plaintiff has absolute control of the

venue and suffers no compensating disadvantage. We have often said that the parties to a lawsuit are entitled to a level playing field, but the decision handed down today marks a significant departure from that just rule.

This state of affairs may lead to results as absurd as they are unfair. In a hypothetical case, a trainman suffers injury on a westbound train passing through Bristol, Virginia. If he seeks to recover for his injuries in Portsmouth, the defendant railroad may, for good cause shown, obtain a transfer of the case to Bristol, where the cause of action arose, pursuant to Code §8.01-265. On the other hand, if the accident occurs a few seconds later, when the train has crossed into Bristol, Tennessee, the plaintiff may force the railroad to defend itself in Portsmouth, Virginia. Thus, the defendant might

have a strong incentive to contend that the accident occurred in Virginia, and the plaintiff to contend that it occurred in Tennessee.

There is, in my view, no conceivable rational basis for the statute under consideration. It makes a distinction between causes of action arising within and without the state which arbitrarily discriminates against FELA defendants and serves no valid state interest.

It is unnecessary to look to foreign authority for the origins of forum non conveniens. That doctrine has been codified by statute in Virginia, in strong language. Code §8.01-257, which the majority opinion fails to mention, provides, in pertinent part: "[E]very action shall be commenced and tried in a forum convenient to the parties and witnesses, where justice can be

administered without prejudice or delay." The non-dismissal clause under review here accords the benefit of that clear declaration of legislative policy to FELA plaintiffs, wherever their causes of action arises in Virginia, but denies it to FELA defendants where the cause of action arises outside the state.

The majority opinion labors diligently to suggest a rational basis which might justify this obvious discrimination. It suggests two possible justifications. The first suggested justification is that the state might have some concern that a plaintiff whose case is dismissed here might have nowhere else to go, "because of the bar of the statute of limitations or other reason." There are several answers to that concern. Forum non conveniens is discretionary. The court

need not dismiss the plaintiff's case unless the plaintiff actually has an available forum, convenient to both parties, in which his case may be tried. If the court is in doubt, it need not immediately dismiss the case, but may grant a stay until the availability of the more convenient forum can be tested. Finally, the majority's concern about the statute of limitations is singularly unpersuasive. That situation would arise only where the plaintiff not only sought to disadvantage the defendant by bringing his action in an inconvenient forum, but compounded his unfair tactics by waiting until the latest possible time in which to do so.

The second "rational reason" given by the majority opinion to support the non-dismissal clause is that by adopting the long-arm statute, Virginia sought to extend its jurisdiction to the maximum

limits permitted by the Due Process Clause, and that dismissals under forum non conveniens would contravene that policy. That reasoning is flawed in three respects. First, the General Assembly, by codifying forum non conveniens in the sweeping language of Code §8.01-257, adopted that doctrine as legislative policy just as clearly as its extension of long-arm jusisdiction. The two policies coexist, and it is our duty to harmonize them, not to submerge one to serve the other. Second, forum non conveniens has no impact whatever on the court's jurisdiction. The doctrine concedes that the court has jurisdiction, but justifies a refusal to exercise it where to do so would be unfair to the defendant or burdensome to the public. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-09 (1947). Finally, the extension of jurisdiction

represented by the long-arm statutes is completely irrelevant to the present case. The defendant railroad does business in Virginia and has a statutory agent for the service of process. No long-arm proceedings are involved. We are discussing venue, not jurisdiction.

Because the discrimination and unfairness resulting from the non-dismissal clause of Code §8.01-265 is obvious and egregious, and because I can perceive no rational justification for it, I would hold it unconstitutional as applied, in violation of the Equal Protection Clause, U.S. Const. amend XIV, §1.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 22nd day of September, 1989.

Seaboard System Railroad, Inc.,

Appellant,

against Record No. 870490

Circuit Court No.

L-86-127

William L. Caldwell,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 9th day of June, 1989 and grant a rehearing thereof, the prayer of the said petition is denied.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 23rd day of October, 1989.

Seaboard System Railroad, Inc.,

Appellant,

against Record No. 870490

Circuit Court No.

L-86-127

William L. Caldwell,

Appellee.

ORDER DEFERRING ISSUANCE OF MANDATE

Upon consideration of the motion of the appellant, by counsel, it is ordered that issuance of the mandate herein be and the same hereby is deferred, to and including the 21st day of December, 1989, on the expiration of which time the same may be issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance thereof shall be

deferred until the final determination of the case by that Court.

PORTSMOUTH CIRCUIT COURT

ALL RAILROADS EXCEPT NORFOLK & PORTSMOUTH BELT LINE

CASES FILED PER YEAR:

1981	7	
1982	6	
1983	18	
1984	18	
1985	61	
1986	98	
1987	160	
1988	185	
1989	190	(through 12/4/89)
	743	

ALLEGED LOCATION OF ACCIDENT:

Portsmouth	16
Virginia, not Portsmouth	227
Out of Virginia	488
	731

Some locations not pled.

PORTSMOUTH CIRCUIT COURT

CHESAPEAKE & OHIO RAILWAY COMPANY

CASES FILED PER YEAR:

1981	2	
1982	0	
1983	7	
1984	8	
1985	29	
1986	36	
1987	36	
1988	1	
1989	0	(through 12/4/89)
	119	

ALLEGED LOCATION OF ACCIDENT: (1981 through 12/4/89)

Kentucky	17
Maryland	2
Michigan	1
North Carolina	1
Ohio	3
Virginia, not Portsmouth	50
West Virginia	26
Locations not pled	18
	118

PORTSMOUTH CIRCUIT COURT

CSX TRANSPORTATION, INC.

CASES FILED PER YEAR:

1986	22	
1987	51	
1988	112	
1989	130	(through 12/4/89)
	315	

ALLEGED LOCATION OF ACCIDENT: (Through 12/4/89)

Alabama	7
Florida	2
Georgia	16
Illinois	5
Indiana	2
Kentucky	33
Maryland	5
Michigan	3
North Carolina	69
Ohio	14
Pennsylvania	1
South Carolina	11
Tennessee	11
Virginia, Portsmouth	10
Virginia, not Portsmouth	51
West Virginia	34
Location, not pled	40
	314

PORTSMOUTH CIRCUIT COURT

NORFOLK AND WESTERN RAILWAY COMPANY

CASES FILED PER YEAR:

1981	3	
1982	0	
1983	2	
1984	0	
1985	4	
1986	10	
1987	71	
1988	68	
1989	53	(through 12/4/89)
	211	

ALLEGED LOCATION OF ACCIDENT:

Kentucky	1
North Carolina	4
Ohio	7
Virginia, Portsmouth	6
Virginia, not Portsmouth	109
West Virginia	13
Garnishments	3
Transferred to other Virginia Jurisdictions	3
Location not pled	65
	211

PORTSMOUTH CIRCUIT COURT

SEABOARD SYSTEM RAILROAD, INC.

CASES FILED PER YEAR:

1981	2	
1982	6	
1983	9	
1984	10	
1985	28	
1986	30	
1987	1	
1988	0	
1989	0	(through 12/4/89)
	86	

ALLEGED LOCATION OF ACCIDENT:

Alabama	1
Florida	4
Georgia	13
Indiana	3
Kentucky	2
North Carolina	34
South Carolina	6
Tennessee	6
Virginia, Portsmouth	2
Virginia, not Portsmouth	9
Transferred to other Virginia Jurisdictions	2
File in Supreme Court	1
Location not pled	3
	86

PORTSMOUTH CIRCUIT COURT

SOUTHERN RAILWAY

CASES FILED PER YEAR:

1987	1
1988	3
1989	4
	8

ALLEGED LOCATION OF ACCIDENT:

Georgia	1
South Carolina	3
Tennessee	1
Virginia, not Portsmouth	2
Transferred	1
	8

Trial Testimony

William L. Caldwell

Q. Mr. Caldwell, where do you live?

A. 1507 Vancouver Drive, Charlotte, North Carolina.

***

Q. You say you're a conductor/switchman. What railroad did you work for?

A. Seaboard Coastline Railroads.

Q. And how long have you worked with that railroad, Mr. Caldwell?

A. Nineteen and-a-half years.

***

A. Yes, I was taken to Nile Clinic.

Q. And where is that located?

A. In Charlotte, North Carolina.

Q. And what happened at Nile Clinic?

A. I saw the company doctor, Dr. Beard.

***

Trial Testimony

Marvin R. Deese

A. Marvin Reid Deese.

Q. Where do you reside?

A. Pardon?

Q. Where do you reside?

A. Charlotte, North Carolina.

Q. And what's your occupation?

A. Yard conductor.

***

Trial testimony

William M. Mauney

Q. Mr. Mooney, would you state your name, please.

A. William Murphy Mooney.

Q. And your address.

A. Charlotte, North Carolina, 1924 Bennett Place.

Q. and how long have you resided there?

A. About 16 years.

***

Q. And were you operating a yard engine on April 4, 1984?

A. I was operating a yard engine yes, sir.

***

Trial Testimony

De Bene Esse Deposition

Trevor I. Goldberg

A. My name is Trevor Ian Goldberg. My office is at 1600 East Third Street in Charlotte 28204.

Q. What is your profession?

A. I'm a medical physician and I am a specialist in otolaryngology.

Pursuant to Rule 28.1, petitioner submits the following Statement of Corporate Affiliations:

Seaboard System Railroad, Inc., was renamed CSX Transportation, Inc. on July 1, 1986 and the surviving corporation under the name of CSX Transportation, Inc. succeeded to the ownership of the property of Seaboard System Railroad, Inc. CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation and has the following subsidiaries (except wholly - owned): Alleghany and Western Railroad Co., Augusta and Summerville Railroad Co., Beaver Street Tower Co.,

Chatham Terminal Co., Colearfield and Mahoning Railway Co., Dayton and Michigan Railroad Co., Dayton and Union Railroad Co., Fruit Growers Express Co., The Home Avenue Railroad Co., North Charleston Terminal Co., Paducah &

Illinois Railroad Co., The Baltimore and Cumberland Valley Railroad Extension Co., Winston-Salem Southbound Railway Co., Woodstock & Blocton Railway Co., Richmond - Washington Co. and Richmond, Fredericksburg and Potomac Railroad Co.

STATEMENT OF THE CASE

Petitioner, Seaboard System Railroad, Inc., is incorporated in the Commonwealth of Virginia. It operates substantial rail lines, yards, and terminals there. (Trans. of Apr. 2, 1986, at 24.) This action was brought in the Circuit Court for the City of Portsmouth, where petitioner does business and where venue was properly laid under Virginia law. Before trial, petitioner moved to dismiss for forum non conveniens because the case arose from a railroad accident in Charlotte, North Carolina, and because Virginia Code section 8.01-265, which allows transfers but not dismissals for forum non conveniens, was unconstitutional. The circuit court denied the motion.

At trial, petitioner presented evidence from a single eyewitness to the accident

No. 89-1035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SEABOARD SYSTEM RAILROAD, INC.,
Petitioner,

v.

WILLIAM L. CALDWELL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

GEORGE A. RUTHERGLEN*
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
Charlottesville, VA 22901
(804) 924-7015

EDDIE W. WILSON
JOHN W. HALL
WILSON & ASSOCIATES, P.C.
Post Office Box 11168
Norfolk, VA 23517
(804) 625-1277

Attorneys for Respondent
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

22pp

QUESTION PRESENTED

Whether Virginia Code section 8.01-265 is unconstitutional because it prohibits a dismissal for forum non conveniens on behalf of a defendant incorporated in the Commonwealth of Virginia and with substantial business operations there?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

(Trial Trans., Vol. II, at 166) and an expert witness, a doctor, who twice examined respondent in Jacksonville, Florida, and who maintained his office in Nashville, Tennessee. (Trial Trans., Vol. II, at 206, 210-11, 233-34.) After trial, which resulted in a verdict for respondent, petitioner renewed its motion to dismiss for forum non conveniens. The circuit court again denied the motion, again upholding the constitutionality of section 8.01-265. The court also concluded that even if a dismissal were allowed by section 8.01-265, it should be denied. In particular, the circuit court found that "the case has been heard, fully heard, with no witnesses that I know of record that did not appear because they were not able to appear because of the ruling of the Court . . . ." (Trans. of Feb. 24, 1987, at 3.) Judgment was entered for

respondent and the Supreme Court of Virginia affirmed.[1]

SUMMARY OF REASONS FOR DENYING THE WRIT

The decision below upheld Virginia Code section 8.01-265, a statute modeled on the federal transfer statute, 28 U.S.C. § 1404(a) (1982). It did not decide any question of

---

[1] Petitioner's lengthy description of the docket of the Circuit Court of the City of Portsmouth is based on evidence not in the record. The precise statistics cited by petitioner were compiled after the proceedings below were concluded. Pet. Cert. at 57A-62A. Although similar statistics were presented to the circuit judge, he refused to take judicial notice of them. He did so because they represented petitioner's selective summary of facts disclosed in the judicial records in other cases. (Trans. of Feb. 24, 1987, at 6-13.) Although petitioner has repeatedly referred to these statistics on appeal, at no point has petitioner contested the circuit judge's ruling that excluded them from consideration in this case. The circuit judge, after all, was in the best position to take judicial notice of evidence about the docket of the court on which he sits.

federal law contrary to any decision of any other court. Indeed, petitioner fails to cite a single decision of this Court, or of any other court, that is in conflict with the decision below. Instead, all of the issues in this case have long since been settled by this Court, mainly in its leading decisions on the doctrine of forum non conveniens and on the procedures in state court under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60 (1982). Petitioner cites no decision holding section 8.01-265, or any similar statute, to be unconstitutional, effectively conceding that the decision below does not create any conflict that must be resolved by this Court.

The decision below instead concerns matters of procedure and internal judicial administration which are of significance only within the state of Virginia. The docket of a

single state trial court, the Circuit Court for the City of Portsmouth, which petitioner discusses at such length, raises no issues of national significance.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE SUPREME COURT OF VIRGINIA IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT.

Section 8.01-265 provides for transfers between the courts of Virginia, but it does not allow any case that is brought in a proper forum in Virginia to "be dismissed on the basis that there is a more convenient forum in a jurisdiction other than in the Commonwealth of Virginia." The Virginia Supreme Court held that the distinction drawn by section 8.01-265, between transfers from one court to

another within Virginia and dismissals for forum non conveniens in favor of a court outside Virginia, serves two important purposes: first, it avoids the risk that dismissals will cause the plaintiff's action to be barred in the alternative forum by the statute of limitations; and second, it furthers the policy underlying the Virginia long-arm statute of allowing personal jurisdiction to be asserted to the constitutional limits. Caldwell v. Seaboard System Railroad, Inc., 238 Va. 148, 153, 380 S.E.2d 910, 912-13 (1989); Pet. Cert. at 29A-31A.

This Court has repeatedly recognized that dismissals for forum non conveniens are a discretionary limitation upon a state's exercise of power over a defendant within its jurisdiction. Piper Aircraft v. Reyno, 454 U.S. 235, 257 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504-507 (1947). In two

FELA cases, just like the present one, this Court has made clear that the states are free to allow or to prohibit dismissals for forum non conveniens as they see fit. Pope v. Atlantic Coast Line R.R., 345 U.S. 379, 383-87 (1953); Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1, 4-5 (1950). Consistently with these decisions, the states which have adopted the doctrine of forum non conveniens have recognized that they were under no constitutional compulsion to do so. E.g., Chambers v. Merrell-Dow Pharmaceuticals, Inc., 35 Ohio St. 123, 127-28, 519 N.E.2d 370, 374 (1988).[2] Likewise, in interpreting the fed-

---

[2] Contrary to petitioner's characterization, Virginia did not adopt the doctrine of forum non conveniens in Virginia Code section 8.01-257. Section 8.01-257 is simply the preamble to the chapter on venue in the Virginia Code. It was enacted simultaneously with section 8.01-265, in the same comprehensive revision of Title 8 of the Code of Virginia in 1977. In any event, this question of Virginia law was resolved against petitioner by the Supreme Court of Virginia when it

eral transfer statute, 28 U.S.C. § 1404 (198-2), this Court has recognized precisely the same distinction between transfers and dismissals as the Virginia Supreme Court: "The harshest result of the application of the old doctrine of forum non conveniens, dismissal of the action, was eliminated by the provision in § 1404(a) for transfer." Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955).[3]

---

concluded that Virginia recognizes the doctrine of forum non conveniens only to the extent of allowing transfers, but not dismissals. Caldwell v. Seaboard System Railroad, Inc., 238 Va. 148, 153, 380 S.E.2d 910, 912-13 (1989); Pet. Cert. at 29A-30A.

[3] These harsh consequences are real, not hypothetical. Two recent FELA cases, just like the present one, were first dismissed for forum non conveniens and then dismissed in the alternative forum under the statute of limitations. Gibbs v. Illinois Central Gulf R.R., 420 N.W.2d 446 (Iowa 1988); Reed v. Norfolk & Western Ry., 635 F. Supp. 1166 (N.D. Ill. 1986); see also Cole v. Lee, 435 S.W.2d 283 (Tex. Civ. App. 1968) (action dismissed for forum non conveniens even though it might have been barred in alternative forum by the statute of limitations).

Petitioner nevertheless contends that section 8.01-265 denies due process and equal protection. The first of these arguments ignores the fact that petitioner is incorporated in the Commonwealth of Virginia and conducts substantial business there. The Due Process Clause clearly allows a state court to exercise personal jurisdiction over a defendant who conducts substantial, continuous, and systematic business within the state, even on a claim that arose elsewhere. E.g., Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414-16 (1984); Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 447-49 (1952); International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945). Only in an extreme case, in which the burden upon the defendant is severe, does fundamental fairness prohibit the exercise of personal jurisdiction over a defendant on grounds of inconvenience alone.

Asahi Metal Industries Co. v. Superior Court, 480 U.S. 102, 113-16 (1987). Petitioner has made no showing of extreme inconvenience in this case. On the contrary, the trial court explicitly found that this case was fully heard with no known witnesses who were unable to appear. (Trans. of Feb. 24, 1987, at 3.) As a corporation of Virginia with substantial operations there, it did not suffer any substantial inconvenience, let alone a severe burden, in defending a claim in Virginia that arose in the adjacent state of North Carolina. This fact-specific decision, in any event, would not warrant review by this Court.

Petitioner's argument under the Equal Protection Clause was put to rest by this Court in American Motorists Insurance Co. v. Starnes, 425 U.S. 637 (1976). That case upheld a Texas statute that explicitly provided for broader venue in actions against foreign

corporations than in actions against domestic corporations because it did not give domestic corporations "any appreciable advantage" over foreign corporations. Id. at 642-44. In words that apply equally well to the present case, this Court stated: "[I]t is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights." Id. at 644, quoting Cincinnati Street Ry. Co. v. Snell, 193 U.S. 30, 36-37 (1904). In arguing to the contrary, petitioner principally relies upon Power Manufacturing Co. v. Saunders, 274 U.S. 490 (1927), which invalidated a state venue statute that explicitly discrminated against foreign corporations. Justice Holmes, whom petitioner quotes so prominently, voted to uphold the state statute in Power Manufacturing and, more recently, that decision was

explicitly called into question in American Motorists. 425 U.S. at 645 n.6 (1976). In any event, Power Manufacturing is plainly distinguishable since section 8.01-265 does not discriminate against out-of-state corporations.

On the contrary, section 8.01-265 is completely evenhanded, in its language, purpose, and effect. It does not apply just to FELA cases. Its literal terms apply to all actions and all defendants in the courts of Virginia. The only group that feels the burden of this statute, if it is any burden at all, consists of all the residents of Virginia and all the corporations that engage in substantial, continuous, and systematic business in Virginia. It is hard to conceive of a more broadly defined group. Its members comprise virtually the entire electorate of Virginia. If they believe that section 8.01-265 works on

balance to their disadvantage, they are perfectly capable of making their case for repeal to the state legislature. There is no need for a decision by this Court on the wisdom of section 8.01-265.[4]

---

[4] Not content with the facts of this case, petitioner relies upon two hypothetical cases to argue that section 8.01-265 denies equal protection. Petitioner contends that an FELA case that arose in Bristol, Virginia, but was brought in Portsmouth, could be transferred, but that a similar FELA case, which arose in the neighboring city of Bristol, Tennessee, and was also brought in Portsmouth, could not. Pet. Cert. at 9-10, 14. This argument rests on a misconception of Virginia law.

It is plain from the face of section 8.01-265 that a transfer would be allowed in both cases. In actions brought in a permissible venue, like the present one, the statute authorizes a transfer "to any fair and convenient forum having jurisdiction within the Commonwealth." Both of these cases could be transferred to Bristol, Virginia, if that were a more convenient forum. If there were personal jurisdiction in Portsmouth, Virginia, there would be personal jurisdiction in Bristol, Virginia, and that is all that is necessary for a transfer under section 8.01-265.

II. THE DECISION OF THE SUPREME COURT OF VIRGINIA DID NOT RESOLVE ANY NOVEL QUESTION OF FEDERAL LAW AND NONE OF ANY IMPORTANCE OUTSIDE VIRGINIA.

Section 8.01-265 applies only to proceedings within the courts of Virginia. It is a statute wholly concerned with the internal administration and procedure of the courts of that state. Whatever burden section 8.01-265 imposes upon the courts of Virginia or upon the residents and corporations of Virginia is a matter of purely local concern. So far from discriminating against out-of-state litigants, section 8.01-265 operates mainly, as it did in this case, to allow out-of-state plaintiffs to sue in-state defendants. The effect of the statute is fully consistent with both the letter and the spirit of the Commerce Clause and the Privileges and Immunities Clause. U.S. Const. art. I, § 8; art. IV, § 2. If

residents and corporations of Virginia are dissatisfied with section 8.01-265, they are perfectly capable of taking their case for repeal to the state legislature.

Petitioner has failed to cite any decision by any other court that holds any statute even remotely similar to section 8.01-265 to be unconstitutional. In upholding section 8.01-265, the Supreme Court of Virginia reached a decision of purely local significance. Petitioner concedes as much by presenting statistics, explicitly excluded from consideration by the trial court, about the docket of the Circuit Court for the City of Portsmouth. See note 1 supra. This one-sided presentation of statistical evidence gives no indication whatsoever of the scope of FELA litigation in state courts throughout the nation. Whatever petitioner's statistics prove, they are limited to the docket of a

single trial court in a single state. The question presented by this case is likewise limited. It is not of national importance and it does not require this Court to reexamine well-settled principles of federal law.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be denied.

Respectfully submitted,

George A. Rutherglen
University of Virginia
School of Law
Charlottesville, Virginia 22901
(804) 924-7015

Counsel for Respondent

(3)

No. 89-1035

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CSX TRANSPORTATION, INC.,
Petitioner,
v.
WILLIAM L. CALDWELL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

MOTION OF NORFOLK SOUTHERN CORPORATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR *AMICUS CURIAE* NORFOLK SOUTHERN CORPORATION IN SUPPORT OF PETITIONER

WILEY F. MITCHELL, JR.
HENRY DEJ. LIGHT
STEVEN J. ANTHONY
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, Virginia 23510
(804) 629-2600

REX E. LEE *
RONALD S. FLAGG
VINCENT F. PRADA
MICHAEL D. WARDEN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Amicus Curiae

* Counsel of Record

January 19, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

3184

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1035

CSX TRANSPORTATION, INC.,
Petitioner,

v.

WILLIAM L. CALDWELL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

MOTION OF NORFOLK SOUTHERN CORPORATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, Norfolk Southern Corporation ("Norfolk Southern") hereby respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari filed by CSX Transportation, Inc. in this case.[1]

At issue in this case is the constitutionality of a Virginia statute (Va. Code § 8.01-265 (1984)) that has the effect of permitting application of the doctrine of *forum non conveniens* in cases where the more con-

---

[1] Counsel for Petitioner has granted its written consent to the filing of the attached brief, while counsel for Respondent has refused to grant such consent.

venient forum is located within the Commonwealth of Virginia, but absolutely prohibiting application of the doctrine in cases where the more convenient forum is located outside of Virginia. This issue arises in the context of a suit filed by a railroad employee against his railroad employer seeking monetary damages for a work-related injury pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*

Norfolk Southern is a non-carrier holding company that, *inter alia*, owns all of the outstanding common stock of Norfolk and Western Railway Company ("N&W") and Southern Railway Company ("Southern").[2] Through these subsidiaries, Norfolk Southern operates the second largest freight-hauling railroad system in the Eastern United States, with combined rail trackage of approximately 17,000 miles extending from Canada to Florida and from the East Coast to Kansas City. Norfolk Southern and its railroad subsidiaries have over 30,000 employees, virtually all of whom are covered by the provisions of FELA. From 1985 through 1989, more than 3,400 FELA lawsuits were filed against Norfolk Southern, with over 1,400 cases in 1989 alone. Norfolk Southern, N&W and Southern are each incorporated in the Commonwealth of Virginia, where Norfolk Southern also maintains its corporate headquarters.

Because of its status as a Virginia corporation subject to suit in Virginia courts on FELA claims brought by rail employees for alleged work-related accidents occurring in any one of the many states in which it conducts rail operations, Norfolk Southern has a significant financial interest in the outcome of this case, and in the validity of Virginia Code § 8.01-265. As in Respondent's case, many of these FELA suits against Norfolk Southern have involved alleged work-related accidents that occurred outside of Virginia and had no connection what-

---

[2] Unless otherwise indicated, references herein to Norfolk Southern shall include N&W and Southern.

soever to the plaintiff's chosen forum. In many instances, defending such suits in Virginia imposes significant expense and burden on Norfolk Southern, which must bear the cost of bringing necessary witnesses from distant locations to appear at trial, and which in some cases is unable to secure the testimony of essential witnesses, especially attending physicians, who may be outside the scope of the Virginia court's subpoena power. As a direct result of Virginia Code § 8.01-265, and the Virginia Supreme Court's decision sustaining its validity, however, Norfolk Southern is prohibited from seeking, on *forum non conveniens* grounds, the dismissal or tranfer of these and other FELA actions to more convenient forums, regardless of the expense and prejudice imposed on Norfolk Southern by the plaintiff's choice of an inconvenient forum, and even though Virginia law would permit transfer on *forum non conveniens* grounds when the more convenient forum is located *within* Virginia.

As a major railroad system subject to FELA, Norfolk Southern has a vital interest in ensuring that FELA operates in a fair and equitable manner and that the procedural requirements applicable to state court FELA actions do not impose unreasonable burdens and expense on defendant railroads such as Norfolk Southern. This interest extends to ensuring that FELA cases are tried in the most convenient forum available and that state *forum non conveniens* rules do not irrationally discriminate between in-state and out-of-state FELA causes of action in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Accordingly, as one of the two railroad systems (along with Petitioner) most directly and adversely affected by the discriminatory application of the doctrine of *forum non conveniens* mandated by the Virginia statute at issue in this case, Norfolk Southern requests leave to submit this *amicus curiae* brief in support of the petition for a writ of certiorari in order both to stress the importance

of the issue herein to Norfolk Southern and to the rail industry as a whole, and to identify the Equal Protection restraints on the application of *forum non conveniens* principles in FELA cases. Norfolk Southern respectfully requests that its motion for leave to file the attached brief as *amicus curiae* be granted for these purposes.

Respectfully submitted,

WILEY F. MITCHELL, JR.
HENRY DEJ. LIGHT
STEVEN J. ANTHONY
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, Virginia 23510
(804) 629-2600

REX E. LEE *
RONALD S. FLAGG
VINCENT F. PRADA
MICHAEL D. WARDEN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Amicus Curiae

* Counsel of Record

January 19, 1990

QUESTION PRESENTED

Amicus curiae will address the following question:

Whether a state statute that permits application of the doctrine of *forum non conveniens* when the more convenient forum is located *within* the state, but absolutely prohibits application of the doctrine when the more convenient forum is located *outside* the state, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

TABLE OF AUTHORITIES—Continued

STATUTES

LEGISLATIVE MATERIALS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1035

CSX TRANSPORTATION, INC.,
Petitioner,

v.

WILLIAM L. CALDWELL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

BRIEF FOR *AMICUS CURIAE* NORFOLK SOUTHERN CORPORATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Amicus curiae Norfolk Southern Corporation ("Norfolk Southern") is a non-carrier holding company that, *inter alia*, owns all of the outstanding common stock of both Norfolk and Western Railway Company ("N&W") and Southern Railway Company ("Southern").[1] Through these subsidiaries, Norfolk Southern operates the second largest freight-hauling railroad system in the Eastern United States, with combined rail trackage of approximately 17,000 miles extending from Canada to Florida and from the East Coast to Kansas City. Norfolk Southern and its railroad subsidiaries have over 30,000 rail operating employees, almost all of whom are covered by

---

[1] Unless otherwise indicated, references herein to Norfolk Southern shall include N&W and Southern.

the provisions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*

FELA authorizes railroad workers to sue their employer under a negligence-based standard for damages resulting from on-the-job injuries. See 45 U.S.C. § 51. Over the last five years, Norfolk Southern employees have made over 19,000 claims under FELA. Although many of these claims are settled without litigation, FELA claimants have filed more than 3,000 lawsuits against Norfolk Southern during that period. From 1985 through 1989, Norfolk Southern paid out in excess of $350 million in satisfaction of FELA claims. In addition to payments made directly to FELA claimants, Norfolk Southern bears an annual expense of approximately $12 million in litigation and associated costs arising from FELA claims. FELA claims thus represent for Norfolk Southern a significant (and, indeed, growing) expense of doing business as a railroad.[2]

Although the large majority of FELA claims are paid without litigation, from 1985 through 1989, 3,427 FELA lawsuits were filed against Norfolk Southern. In 1989 alone, Norfolk Southern was named a defendant in 1,422 FELA actions—over four times the number of lawsuits as in 1985. As the number of FELA lawsuits has increased, the forum shopping of plaintiffs has likewise increased. Of the 1,422 FELA actions filed in 1989 against Norfolk Southern, only 594 were filed in the state

---

[2] FELA claims are also a significant cost to the railroad industry as a whole. Although railroad employment has declined by more than 40 percent and reported railroad injuries fell by more than half during the 1980s, total FELA payouts by rail carriers more than doubled from $398 million in 1981 to $811 million in 1988. *See Federal Employers' Liability Act: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989) (prepared statement of William H. Dempsey, President of the Association of American Railroads) at 6. In 1988 alone, over 38,000 FELA claims were reported, and plaintiffs filed over 4,000 FELA lawsuits. *Id.* at 8.

where the cause of action arose and only 559 were filed in the state of the plaintiff's residence.[3]

FELA permits these plaintiffs to choose from a number of potential venues, including state and federal courts located in the state in which the railroad defendant is incorporated or in which it does business, even if the plaintiff's claim did not arise in and has no connection to that state. See 45 U.S.C. § 56. Because personal injury jury verdicts are perceived to be greater in certain localities than in others, a significant number of FELA actions are filed by out-of-state plaintiffs in state court venues situated far from the situs of the accident which gave rise to the FELA claim and far from the residences of witnesses and the plaintiff. Once such an FELA action is filed in a state court having no connection to the cause of action, a railroad defendant's only recourse in obtaining a fair trial in a convenient forum is through the state's *forum non conveniens* procedure.

The Virginia Circuit Court for the City of Portsmouth, the trial court in which Respondent filed his FELA action in the instant case, is one of the venues particularly favored by forum-shopping FELA plaintiffs. Virginia recognizes the doctrine of *forum non conveniens* by statute (Va. Code Ann. § 8.01-257 (1984)), but irrationally discriminates between causes of action arising within the state and those arising outside of the state by permitting Virginia courts to transfer an action to a more convenient forum *inside* Virginia while at the same time prohibiting *any* transfer or dismissal of an action on

---

[3] In many of the 594 cases filed where the accident occurred, the plaintiff also lived in that state. Thus, with respect to statistics relating to Norfolk Southern's FELA cases, there is substantial overlap between the number of cases filed in the state where the cause of action arose and the state where the plaintiff resides (*i.e.*, if a FELA plaintiff lives in Virginia, his accident occurred in Virginia, and he sues in Virginia, then his case is included in both categories).

forum non conveniens grounds when the more convenient forum happens to be located *outside* the state. See Va. Code Ann. § 8.01-265 (1984). Thus, while Virginia expressly recognizes the policies underlying the *forum non conveniens* doctrine, it refuses to apply those policies in precisely those cases in which the plaintiff's chosen forum would impose the greatest burden, expense and inconvenience on a railroad defendant—when the more convenient forum is located outside of Virginia.

Portsmouth, Virginia is not the only "happy hunting ground" (see Pet. App. 45a (Russell, J., dissenting)) for FELA plaintiffs. In fact, neighboring Norfolk is likewise a favored venue for forum-shopping plaintiffs. From 1985 through 1989, 96 FELA cases were filed against Norfolk Southern in the Virginia Circuit Court for the City of Norfolk. Thirty-six of the causes of action arose in Virginia, and 37 of the plaintiffs were Virginia residents. Several other state courts—including Madison County, Illinois, and Brooke County, West Virginia—have come to be preferred by FELA plaintiffs and have been flooded with FELA lawsuits having no connection to the jurisdiction.[4] During the 1985 through 1989 period, FELA plaintiffs sued Norfolk Southern 276 times in Jefferson, Alabama. Only 50 of the accidents occurred in

---

[4] *See Bland* v. *Norfolk & W.Ry. Co.*, 116 Ill.2d 217, 506 N.E.2d 1291, 1297 (1987) ("this court has previously taken notice of the congested dockets of the circuit court of Madison County and has recognized that the congestion is aggravated by the presence of cases similar to the plaintiff's—nonresident FELA cases that have little or no connection with Madison County"); *Espinosa* v. *Norfolk & W.Ry. Co.*, 86 Ill.2d 111, 427 N.E.2d 111, 113-14 (1981) (of 438 FELA cases filed in Madison County courts from 1976 to 1978, 156 involved accidents outside Illinois, and of those 156 cases, 83 plaintiffs resided in states other than Illinois); *Gardner* v. *Norfolk & W.Ry. Co.*, 372 S.E.2d 786, 787 (W.Va. 1988) (of 103 FELA cases filed in Brooke County, none involved residents of Brooke County and 60 involved nonresidents of West Virginia; none of the fact witnesses or expert witnesses resided in Brooke County), *cert. denied*, 109 S.Ct. 1132 (1989).

Alabama, and 57 plaintiffs lived in Alabama. In Brooke County, West Virginia, 1,043 cases were filed from 1986 through 1989, and only 239 of the causes of action arose in West Virginia and 233 plaintiffs resided there.

Because Norfolk Southern, N&W and Southern are each Virginia corporations (like Petitioner), they are subject to suit under FELA in the state courts of Virginia. Accordingly, each of these rail carriers may be sued in Virginia state court on an FELA cause of action arising anywhere in the United States. As a result of the Virginia statutory provision at issue in this case, Norfolk Southern and Petitioner—regardless of how prejudicial and burdensome it may be to defend a particular FELA suit in Virginia—are unable to obtain dismissal or transfer of such an action to a more convenient forum under the doctrine of *forum non conveniens* if that forum is outside of Virginia. This is true despite the fact that Virginia has explicitly recognized the doctrine by statute and even though transfer on *forum non conveniens* grounds would be available if the more convenient forum happened to be located within the Commonwealth of Virginia.

Norfolk Southern has a vital interest in ensuring that FELA operates in a fair and equitable manner and that procedural requirements applicable to state court FELA actions do not impose unreasonable burdens on defendant railroads such as Norfolk Southern. Norfolk Southern's interest extends to ensuring that FELA cases are tried in the most convenient forum available and that *forum non conveniens* rules do not frustrate the operation of FELA by irrationally discriminating between in-state and out-of-state causes of action in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Norfolk Southern has a significant stake in this case because the challenged statute forces Norfolk Southern to defend FELA lawsuits in Virignia forums where the alleged work-related accidents

did not occur, where none of the witnesses reside, and where plaintiffs do not reside, even though more convenient forums outside of the state may be readily available to the parties and fully competent to enforce the plaintiff's FELA rights.

STATEMENT

Respondent William L. Caldwell, a North Carolina resident employed by Petitioner, was injured in Charlotte, North Carolina, by the sound of a locomotive's horn which caused hearing loss and "other disabilities." Pet. App. 24a. All of the fact witnesses, including Respondent himself, resided in or near Charlotte, North Carolina, as did Respondent's three attending physicians. Pet. App. 9a, 23a, 36a-37a, 65a. Rather than file an FELA suit in federal or state court in North Carolina or in federal court in Virginia, Respondent elected to bring his FELA suit in the Virginia Circuit Court for the City of Portsmouth, characterized by the dissent below as a "happy hunting ground" for FELA plaintiffs. Pet. App. 45a (Russell, J., dissenting).

Petitioner filed a timely motion to dismiss the action on *forum non conveniens* grounds, arguing that Portsmouth was an inconvenient forum and that the appropriate forum was in Charlotte, North Carolina. Pet. App. 4a-8a. Virginia law expressly recognizes the policies underlying the doctrine of *forum non conveniens*. See Va. Code Ann. § 8.01-257 (1984). While permitting a trial court to transfer an action to "any fair and convenient forum" within Virginia, however, Virginia Code Section 8.01-265 bars a court from dismissing an action on *forum non conveniens* grounds under *any* circumstances if the more convenient forum is located *outside* of Virginia. Petitioner contended that this so-called "non-dismissal" provision of Section 8.01-265 contravened the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Commerce Clause

of the United States Constitution, and also violated certain provisions of the Virginia Constitution. Pet. App. 6a-7a. Although the trial court recognized that application of the federal *forum non conveniens* doctrine (which permits transfer to a more convenient forum) would clearly mandate the adjudication of Respondent's claims in a North Carolina court (Pet. App. 10a), it rejected Petitioner's constitutional challenges and, on the basis of Section 8.01-265, denied Petitioner's motion to dismiss. Pet. App. 11a. After trial, the jury returned a verdict of $1,500,000 against Petitioner. Pet. App. 14a-15a.[5]

On appeal to the Supreme Court of Virginia, Petitioner renewed its constitutional challenges to the non-dismissal provision of Section 8.01-265. In a four-to-three decision, the Virginia Supreme Court upheld the validity of this provision. With respect to Petitioner's Equal Protection claim, the court below recognized that the statute created a classification that afforded differing treatment to causes of action arising within Virginia and to those arising out-of-state. Pet. App. 29a. But the court held that this disparate treatment was rationally related to either of two separate state interests.

First, the court below asserted that "there is a significant distinction between the transfer of an action and its dismissal" in that dismissal (but not transfer) might somehow jeopardize a plaintiff's ability to vindicate his or her rights under FELA in another court "because of the bar of the statute of limitations or some other reason." Pet. App. 29a-30a. Second, the Virginia Supreme Court observed that the state's long-arm statute (Va. Code Ann. §§ 8.01-328 to -330 (1984)) authorizes the

---

[5] The trial court subsequently granted Petitioner's motion for remittitur and reduced the verdict to $1,000,000. Pet. App. 16a. In upholding the remittitur, the Virginia Supreme Court observed that "Caldwell's injury and disability have affected him, but the evidence does not indicate a substantial amount of pain, suffering, or embarrassment arising out of the hearing loss." Pet. App. 44a.

exercise of personal jurisdiction to the maximum extent permitted by the Due Process Clause of the Fourteenth Amendment, and held that application of the *forum non conveniens* doctrine to require that a cause of action initially filed in Virginia be brought in a different state would detract from this legislative intent. Pet. App. 30a-31a. Without suggesting how the policies underlying the long-arm statute provided a rational basis supporting Section 8.01-265's restriction on *forum non conveniens*, the court then concluded that "[t]he reconciliation of these competing policies is a matter of legislative discretion." Pet. App. 31a.

Three justices dissented, concluding that "[t]here is . . . no conceivable rational basis for the statute." Pet. App. 49a. The dissent noted that "[a]ttorneys representing railroad employees claiming job-related injuries occurring all over the continental United States apparently think it worthwhile to bring actions against railroads in Portsmouth, or in neighboring Norfolk, rather than in the localities in which the accident occurred." Pet. App. 45a-46a. To emphasize the irrational discrimination that could result from the Virginia statute, the dissent (Pet. App. 48a) cited the following example:

> [I]n a hypothetical case, a trainman suffers injury on a westbound train passing through Bristol, Virginia. If he seeks to recover for his injuries in Portsmouth, the defendant railroad may, for good cause shown, obtain a transfer of the case to Bristol, where the cause of action arose, pursuant to Code § 8.01-265. On the other hand, if the accident occurs a few seconds later, when the train has crossed into Bristol, Tennessee, the plaintiff may force the railroad to defend itself in Portsmouth, Virginia.

The dissent explained that neither of the grounds cited by the majority provided a rational justification for such discriminatory treatment with respect to the availability of the *forum non conveniens* doctrine. First, the dissent found no basis for the majority's concern that dismissal

of an action on *forum non conveniens* grounds might jeopardize the plaintiff's ability to litigate his or her FELA claims in a court outside of Virginia. The dissent explained that, because dismissal of an action on *forum non conveniens* grounds is always discretionary, the trial court could properly dismiss an FELA case only if another convenient forum were actually available to the plaintiff, and also could stay the action pending a final determination of whether another forum is, in fact, available. Pet. App. 50a-51a. The dissent further concluded that the second justification cited by the majority —Virginia's policy to extend the personal jurisdiction of its courts to the limits of the Due Process Clause—was irrational in that the long-arm statute was not implicated at all in this case and that the majority's argument had confused venue and jurisdiction. Pet. App. 51a-53a.

SUMMARY OF ARGUMENT

This case presents the important question whether, in a Federal Employers' Liability Act case, a state statute that permits application of the *forum non conveniens* doctrine if the more convenient forum is situated *within* the state, but absolutely prohibits *any* application of the doctrine if the more convenient forum is located *outside* the state, violates the Equal Protection Clause of the Fourteenth Amendment. A state simply cannot, consistent with the dictates of the Equal Protection Clause, apply its *forum non conveniens* doctrine in a manner that, as here, discriminates without any rational basis against causes of action arising out-of-state. This discriminatory application of the doctrine of *forum non conveniens* imposes a significant burden and expense on the railroad industry and frustrates the fair and efficient administration of the federal FELA program in the state courts.

The adverse effects of the challenged provision are particularly acute because two of the three principal

railroad systems operating in the Eastern United States —Petitioner and Norfolk Southern—are Virginia corporations and, as such, are always subject to suit in Virginia courts on FELA causes of action regardless of the situs of the accident. As a result, potentially all of the many FELA claims brought against these major railroad systems may be subject to the discriminatory *forum non conveniens* provision at issue in this case. Accordingly, this case merits review by this Court.

ARGUMENT

I. THE PETITION RAISES AN ISSUE OF EXCEPTIONAL IMPORTANCE TO NORFOLK SOUTHERN AND TO THE RAILROAD INDUSTRY AS A WHOLE CONCERNING THE FAIR AND NON-DISCRIMINATORY APPLICATION OF *FORUM NON CONVENIENS* PRINCIPLES IN STATE COURT ACTIONS UNDER FELA.

Respondent elected not to bring his FELA action in North Carolina, where the accident occurred, where he resides, and where the fact witnesses and attending physicians were located and within the subpoena power of the court. Respondent also elected not to file his suit in a federal court in Virginia, which could have (and most likely would have) transferred the action to a federal court in North Carolina pursuant to the federal transfer statute which incorporates the basic principles of *forum non conveniens*. See 28 U.S.C. § 1404(a); *Ex parte Collett*, 337 U.S. 55 (1949). Instead, Respondent filed his FELA lawsuit in the Virginia Circuit Court for the City of Portsmouth, a forum that had absolutely no relation to the cause of action but which has apparently developed a reputation for especially generous jury verdicts in personal injury actions. By filing his out-of-state cause of action in a state court in Virginia, Respondent's choice of forum became absolutely immune from challenge on *forum non conveniens* grounds by virtue of the discriminatory effect of the non-dismissal provision of Virginia Code § 8.01-265.

Several procedural provisions applicable to FELA cases enable plaintiffs, such as Respondent, to select from one of several forums in which to file suit against railroads, and place railroads, such as Norfolk Southern, at the mercy of state *forum non conveniens* rules. First, an FELA plaintiff may bring suit in either federal or state court, because the jurisdictions of federal and state courts under the statute are concurrent. 45 U.S.C. § 56. Second, if the plaintiff elects to sue in state court, the defendant railroad may not remove the case to federal court. 28 U.S.C. § 1445(a). Third, FELA's broad venue provisions permit a plaintiff to bring an action in any district in which the defendant resides, the cause of action arose, or the defendant does business. 45 U.S.C. § 56.[6] Finally, federal *forum non conveniens* transfer rules (see 28 U.S.C. § 1404(a)) do not apply to FELA actions brought in state courts. *Pope* v. *Atlantic Coast Line R.R. Co.*, 345 U.S. 379, 383-84 (1953). Rather, FELA actions brought in state court are governed by the state's *forum non conveniens* procedures. *Missouri ex rel. Southern Ry.* v. *Mayfield*, 340 U.S. 1, 5 (1950).

As a result, if state *forum non conveniens* rules do not afford Norfolk Southern and other rail carriers the opportunity to require an FELA plaintiff to refile his or her case in a more convenient forum, whether within the state or outside of the state, the defendant railroad will be faced with the burden and expense of litigating in a forum that has no connection to the cause of action. Once a plaintiff selects a state court forum in Virginia, a railroad defendant is subject to the discriminatory *forum non conveniens* rules of that state. If the more convenient forum is located within Virginia, the *forum non*

---

[6] Decisions of this Court have established that the Commerce Clause imposes certain minimal limitations on venue in FELA actions. In particular, venue may be constitutionally permissible if the rail carrier's lines run through the territory of the court's jurisdiction, but may not be permissible if the defendant railroad operates no rail lines within the jurisdiction of the forum court. *See Denver & R.G.W.R.R. Co.* v. *Terte*, 284 U.S. 284 (1932); *Hoffman* v. *Missouri ex rel. Foraker*, 274 U.S. 21 (1927).

conveniens doctrine applies, and the trial court may therefore transfer the FELA case to that forum. But if the cause of action arose outside of Virginia, the *forum non conveniens* doctrine is unavailable, and the railroad defendant is forced to incur the expense and burden of defending the case in Virginia.

The trial of FELA actions in an inconvenient forum imposes a significant burden and expense on railroads beyond the normal inconvenience and costs associated with defending an FELA lawsuit in the forum where the accident occurred. The additional expense and burden on rail carriers result from several factors. First, because many occurrence witnesses in FELA lawsuits are railroad employees, adjudication of an FELA suit in a distant state results in a significant disruption of operations and loss of employee productivity as these workers must take time away from their normal duties to travel to the foreign jurisdiction for trial. Second, the defendant railroad must pay travel expenses for these witnesses and other witnesses who provided medical care to the plaintiff. Third, the railroad bears additional litigation expense arising from the need to transport documents and other physical evidence to the site of the trial. Finally, these distant venues are not selected by chance, but rather because FELA plaintiffs' attorneys shop for a forum that they believe will provide the largest jury award. While it is impossible to quantify the differential between the actual jury award in an FELA case tried in Portsmouth or Norfolk compared with the award that would have been returned in the forum outside Virginia where the cause of action arose, there can be little doubt that Portsmouth and Norfolk verdicts are widely perceived to be larger than verdicts in comparable cases adjudicated outside of Virginia. That additional, but unquantifiable, cost is significant.

Moreover, if an FELA action is filed in an inconvenient state court venue, the railroad may be significantly prejudiced at trial. First, the railroad would normally lack the use of process to compel the attendance at trial

of out-of-state occurrence witnesses and treating physicians. Second, even if a jury view of the accident scene would provide some of the most probative evidence at trial, a view is simply not available when the suit is tried in a location far distant from the scene of the accident.

The problem of defending FELA actions far from the location of any accident affects more than the railroad industry itself. As Justice Frankfurter once wrote: "The so-called 'convenience' of a railroad concerns the important national function of which the railroads are the agency. As in other phases of federal railroad regulation, the interests of carriers, employees, and the public must be balanced." *Baltimore & O.R.R. Co.* v. *Kepner*, 314 U.S. 44, 58 (1941) (Frankfurter, J., dissenting). Here, the application of the non-dismissal provision of Virginia's *forum non conveniens* statute adversely affects the interests of rail carriers by imposing additional burden and expense on the railroad industry and, because any increased costs ultimately are passed on to consumers, the public as a whole.

II. THE NON-DISMISSAL PROVISION OF VIRGINIA'S *FORUM NON CONVENIENS* STATUTE IMPERMISSIBLY DISCRIMINATES BETWEEN IN-STATE AND OUT-OF-STATE CAUSES OF ACTION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

As applied to FELA actions arising from out-of-state accidents, the non-dismissal provision of Virginia Code § 8.01-265 violates the Equal Protection Clause of the Fourteenth Amendment. There is little question that the Virginia statute creates a classification dividing FELA (and other) causes of action into those that arise within Virginia and those that arise outside of Virginia. There can also be no doubt that the Virginia statute discriminates between these two categories, permitting the application of the *forum non conveniens* doctrine if the cause of action arose within Virginia but prohibiting the application of the doctrine if the cause of action arose outside the state.

In the venue context, the Court has stated that the Equal Protection Clause "does not prevent a State from adjusting its legislation to differences in situation or forbid classification in that connection; but *it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.*" *Power Mfg. Co.* v. *Saunders*, 274 U.S. 490, 493 (1927) (emphasis added). Unless heightened scrutiny is warranted (and neither Petitioner nor *amicus curiae* contends that it is), a legislative classification must be "rationally related to a legitimate state interest." *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). This Court has emphasized that this standard "is not a toothless one." *Mathews* v. *Lucas*, 427 U.S. 495, 510 (1976).[7] To pass scrutiny under the Equal Protection Clause, a challenged classification must meet two tests:

> (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?

Western & Southern Life Ins. Co. v. *State Bd. of Equalization*, 451 U.S. 648, 668 (1981). Here, the classification established by the Virginia *forum non conveniens* statute is arbitrary and is not rationally related to any legitimate state interest.

The Virginia Supreme Court proffered two justifications that it claimed were legitimate state interests to which the non-dismissal provision of Virginia Code § 8.01-265 is rationally related.[8] Contrary to the sweeping as-

---

[7] *See Williams* v. *Vermont*, 472 U.S. 14, 23-24 (1985); *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 877-80 (1985); *Zobel* v. *Williams*, 457 U.S. 55, 61 (1982).

[8] Because these were the only two grounds relied on by the Virginia Supreme Court, this Court should limit its review to these grounds and the State will be free to advance additional grounds, if any exist, on remand. *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 875 (1985).

sertions of the Virginia Supreme Court, there is no rational basis for the distinction created by the Virginia statute. There is no legitimate reason why suits based on causes of action that arise within the state may be transferred to a more convenient forum, while causes of action that arise outside the state must proceed in the inconvenient forum merely because the more convenient forum happens to be located outside of Virginia.

1. The court below first asserted that the challenged provision's different treatment of in-state and out-of-state causes of action was rationally justified by what it regarded as a "significant distinction" between *forum non conveniens* dismissals and transfers. Pet. App. 29a. The court declared that the dismissal of an action on *forum non conveniens* grounds, but not a transfer of an action to a more convenient court within the state, involves a risk that the plaintiff might be barred from asserting his or her cause of action in a second court by the running of the statute of limitations. Pet. App. 29a-30a. Even assuming that avoiding this risk is a legitimate state interest, however, the non-dismissal provision of Virginia's *forum non conveniens* statute is simply not rationally related to this interest.

The decision below is predicated on a fundamental misunderstanding of the application of the FELA statute of limitations. At bottom, there is *no* additional risk to an FELA plaintiff resulting from a *forum non conveniens* dismissal than from a *forum non conveniens* transfer. If an FELA plaintiff files his or her original complaint within the time period specified in the FELA statute of limitations, his or her rights to prosecute the suit are preserved—even in the event that the court in which the suit was filed subsequently determines that it should be dismissed on *forum non conveniens* grounds.

To reach the conclusion that this interest supports the statute, the Virginia Supreme Court ignored two essential principles. First, there is no risk of inconsistent state statutes of limitations because a single federal statute of

limitations applies to all FELA cases, regardless of whether they are brought in federal or state courts. Section 6 of FELA establishes a three-year statute of limitations that governs all FELA cases. 45 U.S.C. § 56; see *Burnett* v. *New York Central R.R. Co.*, 380 U.S. 424, 425-26 (1965). Moreover, it is well settled that "the FELA limitation period is not totally inflexible." *Burnett*, 380 U.S. at 427 (citations omitted).

Second, this Court has specifically held that the FELA statute of limitations is tolled if a timely FELA action is dismissed on venue grounds. In *Burnett*, this Court held that "when a plaintiff begins a timely FELA action in a state court of competent jurisdiction, service of process is made upon the opposing party, and the state court action is later dismissed because of improper venue, the FELA limitation is tolled during the pendency of the state action." *Id.* at 428. Thus, if a timely-filed FELA action is dismissed because of improper venue, the applicable statute of limitations is tolled for the duration of the state suit and until the state court dismissal order becomes final, either by the running of the time to appeal that order or by the entry of final judgment on appeal, *id.* at 435-36, permitting the plaintiff to re-file the suit in a proper venue. This tolling rule enunciated in *Burnett*, where the action was dismissed because of *improper* venue, is equally applicable to dismissal of actions on *forum non conveniens* grounds.[9] To determine whether the statute of limitations should be tolled, the Court in *Burnett* observed that "the basic inquiry is whether the congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Id.* at 427.[10] Toll-

---

[9] In fact, there are more compelling reasons to toll the statute of limitations when the plaintiff's lawsuit has been filed in a *proper*, but inconvenient, venue than when (as in *Burnett*) it is filed in an *improper* venue.

[10] The *Burnett* Court reasoned that a contrary result—refusing to toll the statute of limitations when a timely-filed FELA action is brought in an improper venue—would "produce a substantial nonuniformity [in FELA cases] by creating a procedural anomaly."

ing of the limitations period when a case is dismissed because there is a more convenient venue also would further the purposes of FELA. *Cf. id.* at 434.[11]

In addition, by ignoring the practical aspects of *forum non conveniens* dismissals, the court below incorrectly assumed that the application of *forum non conveniens* dismissal might bar Respondent's case. Courts can, and do, however, take a number of steps to protect the rights of an FELA plaintiff. As an initial matter, the court can properly dismiss the action on *forum non conveniens* grounds *only* if there is, in fact, an alternative venue available. The predicate for any dismissal on *forum non conveniens* grounds is that there is, in fact, an *available*, alternative forum in which the plaintiff can litigate his or her claims. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981). If there is any doubt whether this alternate venue is proper, the court could stay, rather than dismiss, the FELA action pending a test of the venue in the second court. See Pet. App. 51a (Russell, J., dissenting). Moreover, courts often require an FELA defendant seeking *forum non conveniens* dismissal to waive the statute of limitations defense if the new suit is filed in the more

---

Burnett, 380 U.S. at 433. In *Burnett*, the anomaly would occur because an FELA case brought in an improper venue in federal court could be transferred to a proper venue under 28 U.S.C. § 1406(a) and would not be barred by the running of the statute of limitations, while an FELA case filed in state court could be barred by the statute of limitations because there is no analogous state transfer statute. *Id.* at 433-34. In the instant case, if a dismissal of Respondent's suit on *forum non conveniens* grounds did not toll the running of the limitations period, substantial nonuniformity would similarly result between FELA actions brought in federal court and those filed in state court.

[11] Courts are unanimous in recognizing that the holding in *Burnett* also applies to *forum non conveniens* dismissals. *See, e.g., Reed* v. *Norfolk & W.Ry. Co.*, 635 F. Supp. 1166, 1168 (N.D. Ill. 1986); *Missouri Pacific R.R. Co.* v. *Tircuit*, No. 89-IA-177 (Miss. Nov. 29, 1989) (available on LEXIS); *Gibbs* v. *Illinois Central Gulf R.R. Co.*, 420 N.W.2d 446, 448 (Iowa 1988) (assuming *Burnett* applies to *forum non conveniens* dismissals); *Mobley* v. *Southern Ry. Co.*, 418 A.2d 1044, 1050 (D.C. 1980).

convenient forum within a certain period of time. See, *e.g., Missouri Pacific R.R. Co.* v. *Tircuit*, No. 89-IA-177 (Miss. Nov. 29, 1989) (available on LEXIS); *Satkowiak* v. *Chesapeake & O.Ry. Co.*, 106 Ill.2d 224, 235, 478 N.E.2d 370, 375 (1985); *State ex rel. Southern Pacific Transportation Co.* v. *Frost*, 102 N.M. 369, 695 P.2d 1318, 1320 (1985).[12] If the defendant refuses to waive the statute of limitations defense in the second forum, the court will grant the plaintiff leave to refile in the dismissing forum.[13]

In sum, the Virginia Supreme Court's expressed concern about the risk of *forum non conveniens* dismissals to the plaintiff's ability to pursue his or her claim is totally irrational. Under widely-accepted principles of *forum non conveniens*, a dismissal of an action brought in an inconvenient forum *always* presupposes the existence of another available forum in which the plaintiff can fully vindicate his or her rights. Accordingly, the court's concern that such other out-of-state forums might in fact be unavailable to a plaintiff provides no conceivable or rational basis for the Virginia legislature's decision to prohibit the application of *forum non conveniens* principles whenever the more convenient forum is located outside of Virginia.

---

[12] Courts can also impose other conditions on *forum non conveniens* dismissals, including the defendant's consent to comply with the discovery rules of the original forum and to satisfy any judgment rendered against it in the alternate forum. *See, e.g., Dowling* v. *Richardson-Merrell, Inc.*, 727 F.2d 608, 611 (6th Cir. 1984); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842, 867, (S.D.N.Y. 1986), *modified on app.*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987). Thus, it is well within the power of a court to eliminate the unspecified "other risks" of *forum non conveniens* dismissal to which the Virginia Supreme Court referred.

[13] *See, e.g., Dalton* v. *Consolidated Rail Corp.*, No. 54062 (Mo. App. Oct. 11, 1988) (available on LEXIS); *Barnes* v. *Southern Ry. Co.*, 116 Ill.2d 236, 507 N.E.2d 494, 501 (1987); *Wieser* v. *Missouri Pacific R.R. Co.*, 98 Ill.2d 359, 456 N.E.2d 98, 105 (1983).

2. The non-dismissal provision of Virginia's *forum non conveniens* statute also bears no rational relation to the second interest asserted by the Virginia Supreme Court—the policy of Virginia's long-arm statute to extend the jurisdiction of Virginia courts to the maximum extent permitted by the Due Process Clause. There can be little question that the extension of the jurisdiction of state courts is a legitimate state interest. But, here, the non-dismissal provision of the *forum non conveniens* statute is not rationally related to this interest.

The court below confused the *forum non conveniens* doctrine and the concept of personal jurisdiction by assuming that the discretionary dismissal of an FELA action under that doctrine would have an impact on the jurisdiction of Virginia courts. Such a dismissal would have *no* effect on the ability of state courts to exercise personal jurisdiction to the extent permitted by the Virginia long-arm statute. Indeed, the application of the *forum non conveniens* doctrine constitutes the *exercise*—and not the *denial*—of jurisdiction by the court.

The doctrine of *forum non conveniens* applies only to transitory causes of action, where at least two courts have both personal and subject matter jurisdiction and where venue is proper. As this Court noted in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 506-07 (1947), "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; *the doctrine furnishes criteria for choice between them*" (emphasis added).[14] An FELA cause of action is a "deliberately . . . transitory cause of action" in that there may be several forums where the cause of action could be brought. See *Pope* v. *Atlantic Coast Line R.R. Co.*, 345 U.S. 379, 383 (1953). "Indeed, the doctrine of *forum non conveniens* can never apply if there is an absence of jurisdiction or mistake of venue." *Gulf Oil*, 330 U.S. at 504. The doctrine of *forum*

[14] If a defendant is not amenable to process, then it is not within the applicable long-arm statute.

non conveniens only determines where the action may be brought—not whether a court has jurisdiction.

Accordingly, the application of *forum non conveniens* has no impact whatsoever on the jurisdiction of the courts of Virginia. By deciding that *forum non conveniens* dismissal is appropriate, a court recognizes that it has jurisdiction but simply declines to exercise that jurisdiction because a second court that also has jurisdiction offers a more convenient forum for the trial of the action. Thus, the non-dismissal provision of Virginia Code § 8.01-265 is not rationally related to the Commonwealth's asserted interest of extending the personal jurisdiction of Virginia courts as recognized in the Virginia long-arm statute.[15]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

WILEY F. MITCHELL, JR.
HENRY DEJ. LIGHT
STEVEN J. ANTHONY
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, Virginia 23510
(804) 629-2600

REX E. LEE *
RONALD S. FLAGG
VINCENT F. PRADA
MICHAEL D. WARDEN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Amicus Curiae

* Counsel of Record

January 19, 1990

[15] Moreover, in the instant FELA case, the Virginia long-arm statute is not implicated at all. Like Norfolk Southern, Petitioner is incorporated in Virginia and is subject to the jurisdiction of the courts of that state without resort to the use of the long-arm statute. Thus, as applied in this case, the non-dismissal provision of the Virginia *forum non conveniens* statute is simply not related to the personal jurisdiction of Virginia courts under the long-arm statute.

Docket No. 89-1035

IN THE

Supreme Court of the United States

October Term, 1989

CSX TRANSPORTATION, INC.,
Petitioner,

v.

WILLIAM L. CALDWELL,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

William T. Prince
Edward L. Oast
Samuel J. Webster*
WILLIAMS, WORRELL, KELLY,
GREER & FRANK, P.C.
600 Crestar Bank Building
Five Main Plaza East
Post Office Box 3416
Norfolk, Virginia 23514-3416
(804) 624-2600

Counsel for Petitioner
* Counsel of Record

NO. 89-1035

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CSX TRANSPORTATION, INC.,

Petitioner,

v.

WILLIAM L. CALDWELL,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

William T. Prince
Edward L. Oast
Samuel J. Webster*
WILLIAMS, WORRELL, KELLY,
GREER & FRANK, P.C.
600 Crestar Bank Building
Five Main Plaza East
Post Office Box 3416
Norfolk, Virginia 23514-3416
(804) 624-2600

Counsel for Petitioner
* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 89-1035

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CSX TRANSPORTATION, INC.,

Petitioner,

v.

WILLIAM L. CALDWELL,

Respondent.

PETITIONER'S REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, CSX Transportation, Inc., submits this Reply to address arguments first raised in Respondent's Brief in Opposition.

I. VIRGINIA CODE §8.01-265 IS NOT MODELED ON §1404(A) OF THE JUDICIAL CODE

Respondent asserts, without citation of legal authority, that §8.01-265 is modeled on 28 U.S.C.

§1404(a), the federal forum non conveniens transfer statute. Such an assertion has no basis.

Section 1404 provides for nationwide transfer. Had this case been brought in federal court, it most surely would have been transferred to a federal court in or around Charlotte, North Carolina. (App., p.10A).

Beyond providing for transfers of cases within Virginia, Virginia Code §8.01-265 bears no resemblance to §1404. Section 8.01-265 specifically and unconstitutionally prohibits dismissals (conditional or absolute) if the transfer location is outside the Commonwealth of Virginia. Thus, §8.01-265 is contrary to the congressional intent expressed in §1404, and respondent's attempt to equate

§8.01-265 with the federal forum non conveniens transfer statute is absurd.

II. THE "HARSH CONSEQUENCES" OF DISMISSAL ARE NOT SUPPORTED BY RESPONDENT'S CASES

Respondent asserts that "the harsh consequences of dismissal are real," as posited by the Virginia Supreme Court majority, relying upon two FELA cases. (Resp. Brief at 7-8 n.3). In both cases, Gibbs v. Illinois Central Gulf R.R., 420 N.W.2d 446 (Iowa, 1988) and Reed v. Norfolk and W. Ry. Co., 635 F.Supp. 1166 (N.D. Ill. 1986), the alleged "harsh consequence" of dismissal only became a factor when plaintiff himself ran afoul of state procedure and only after application of the tolling rule of Burnette v. New York Central R.R., 380 U.S. 424 (1965). Thus, both cases are distinguishable.

Both Gibbs and Reed applied the tolling rules of Burnette and Billings v. Chicago, Rock Island & Pacific R.R. Co., 581 F.2d 707 (8th Cir. 1978), and still found plaintiffs dilatory. In both cases, plaintiffs, after being dismissed under the doctrine of forum non conveniens, failed to avail themselves of the liberal tolling rules enunciated in Burnette and Billings, thereby hoisting themselves on their own petard! Moreover, in Reed, plaintiff ignored the court's order to file in the more convenient forum in order to take advantage of the railroad's agreement to waive its limitations defense. Thus, plaintiffs' own actions caused the "harsh consequences," not the operation of a forum non conveniens dismissal.

Respondent's reliance upon Cole v. Lee, 435 S.W.2d 283 (Tex. Civ. App.

1968), is even more misplaced. The appellate court in Cole v. Lee never reached the question of whether application of the doctrine of forum non conveniens would result in any "harsh consequences".

Thus, respondent's attempt to bolster the Virginia Supreme Court's reliance upon the "harsh consequences" of dismissal are wholly without basis and should be rejected by this Court.

III. RESPONDENT CONFUSES PERSONAL JURISDICTION AND NO INCONVENIENCE WITH THE EFFECT OF THE NON-DISMISSAL PROVISION

Respondent repeatedly argues that because the court had personal jurisdiction over petitioner and because the case was tried to a verdict, petitioner suffered no inconvenience. The issue of convenience vel non was never decided by the trial court,

although it alluded to a lack of convenience. (App., p.10A). Neither proposition relates to the issue in this case.[1/]

However, neither of these two propositions, personal jurisdiction and lack of inconvenience, relate to the constitutionality of the non-dismissal provision. Rather, petitioner's inability to avail itself of the doctrine of forum non conveniens because of the non-dismissal provision, regardless of personal jurisdiction, shows the statute's discrimination. The

---

1/ Respondent, in arguing jurisdiction, even confuses the Question Presented. (Rep. Brief, P.i.). Respondent suggests in his Question Presented that the statute is constitutional because CSX is incorporated in Virginia and has substantial operations in Virginia. CSX admits both facts. What CSX challenges is the constitutionality of the provision prohibiting dismissals of out-of-state cases based on the doctrine of forum non conveniens. Respondents characterization of the Question Presented is wholly erroneous.

heart of respondent's argument concerning lack of inconvenience ignores the practicalities of being able to appeal venue decisions.[2/] Therefore, respondent's arguments concerning personal jurisdiction and lack of inconvenience have no relation to the issues in this case.

IV. RESPONDENT'S RELIANCE UPON AMERICAN MOTORISTS INSURANCE COMPANY V. STARNES, IS MISPLACED

Respondent states that this Court's decision in American Motorists Insurance Company v. Starnes, 425 U.S. 637 (1976), is dispositive. On the one hand, respondent argues that this case has no significance beyond the boundaries of

---

2/Respondent argues, as he did in the court below, that because this case has been fully tried, granting of the Petition of Certiorari would be inappropriate. (Resp. Brief at 2, 10). Such an argument emasculates the statutory right to appeal an adverse ruling on venue. See Va. Code §8.01-267.

Virginia and therefore should be ignored by this Court. However, the statute in Starnes had no significance beyond the boundaries of Texas, but this Court granted the petition for certiorari and heard the case.

Relying upon Starnes, respondent asserts that §8.01-265 does not discriminate against out-of-state corporations. Respondent again confuses personal jurisdiction over a non-resident defendant with convenience of the place of trial. Indeed, while CSX is incorporated in the Commonwealth of Virginia and does business in Virginia, all of its operations relevant to the instant case are located in Charlotte, North Carolina, aggravating the burden of defending the lawsuit.

Moreover, this Court in Starnes looked beyond the literal terms of the

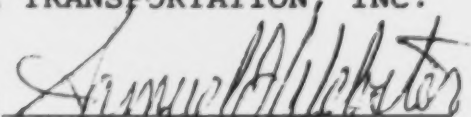
statute to its realistic application, 425 U.S. at 645, and noted that domestic corporations enjoyed appreciably little advantage over foreign corporations in the conduct of their cases. In contrast, CSX, because of the non-dismissal provision, is placed at the appreciable disadvantage of having no compulsory process to obtain the attendance of treating physicians from Charlotte, and of bringing witnesses from Charlotte to Portsmouth for trial. In examining the reality of the situation, this Court's standard articulated in Starnes compels the conclusion that the non-dismissal provision of §8.01-265 violates the Equal Protection Clause of the Constitution.

CONCLUSION

For the reasons stated above, Respondent's Brief in Opposition fails to articulate a rational basis for the non-dismissal provision. The Petition should be granted.

Respectfully Submitted,

CSX TRANSPORTATION, INC.

BY: 
Of Counsel

William T. Prince
Edward L. Oast
Samuel J. Webster*
WILLIAMS, WORRELL, KELLY,
GREER & FRANK, P.C.
600 Crestar Bank Building
Five Main Plaza East
Post Office Box 3416
Norfolk, Virginia 23514-3416
(804) 624-2600

Counsel for Petitioner
*Counsel of Record
January 30, 1990

CERTIFICATE OF SERVICE

In accordance with Rule 28.2 and 28.3, I hereby certify that I have served three (3) copies of this Petition for Writ of Certiorari upon the Respondent, William L. Caldwell, at the office of his counsel of record, Eddie W. Wilson, WILSON & ASSOCIATES, P.C., 2200 Colonial Avenue, Suite 12-B, Post Office Box 11168, Norfolk, Virginia 23517, and Professor George Rutherglen, Professor of Law, University of Virginia School of Law, Charlottesville, Virginia 22901, and upon counsel for Amicus, Norfolk Southern Corporation, Rex E. Lee, Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, pursuant to the requirements of Rules 28 and 33 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with first class

postage prepaid, addressed to Respondent and Amicus as set forth above, on the ___ day of January, 1990.

I further certify that I am a member of this Court, and that all parties required to be served have been served as stated above.

RULE 28.4(c) STATEMENT

Because the constitutionality of Virginia Code §8.01-265 is drawn into question in the Petition for a Writ of Certiorari, 28 U.S.C. §2403(b) may be applicable, and three copies of this Reply to Respondent's Brief in Opposition have been served on the Attorney General of Virginia, the Honorable Mary Sue Terry.

Samuel J. Webster

Counsel for
CSX TRANSPORTATION, INC.